

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITY OF HAMILTON

(the "Employer")

-and-

AMALGAMATED TRANSIT UNION, LOCAL 107

(the "Union")

CONCERNING THE INDIVIDUAL GRIEVANCE OF AB

Sole Arbitrator Kelly Waddingham

APPEARANCES

For the Employer: S. McArthur, Counsel
J.M. Callfas, Counsel
R. Fletcher, Labour Relations Officer
C. Garrish, Operations Manager
D. Hull, General Manager

For the Union: C. Watson, Counsel
AB. Grievor
B. Dhillon. President ATU Local 107
E. Tuck, Vice President ATU Local 107
C. Campbell. Business Agent ATU Local 107

Hearings held in Hamilton on June 21, August 30, October 24, November 7 and 8, 2012, January 11, 14 and 15, February 5, April 2 and 28, May 1 and 15, 2013.

Award issued on September 18, 2013

AWARD

1. This award arises out of a grievance and an application under section 34 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 (“*OHRC*” or “*Code*”) alleging sexual harassment and a poisoned work environment. The case has followed an unusual path. The introduction provides some background context for the evidence that follows.

INTRODUCTION

2. The grievor/complainant, “AB” has worked for the Hamilton Street Railway [the “HSR”] for twenty-three years. The HSR is the public transit service operated by the City of Hamilton [the “City”]. For the past ten years, AB has held the position of “inspector.” It is the task of inspectors to keep the transit service moving efficiently by communicating with transit operators in the field. The HSR employs approximately 425 operators, thirty per cent of whom are women. AB is the HSR’s only woman inspector. Inspectors and operators are represented by the Amalgamated Transit Union, Local 107 [the “ATU”].

3. The HSR’s fourteen inspectors report to one of seven “supervisors” who together constitute the first level of management. The supervisors report to the Transit Manager who, in turn, reports to the Transit Director. The Transit Manager is Mr. Chris Garrish. The Transit Director is Mr. Donald Hull. There are no women in management positions at the HSR.

4. On November 8, 2010, AB initiated a complaint, pursuant to the City’s directive, *Resolving Harassment and Discrimination Issues*, against her supervisor, Mr. William [“Bill”] Richardson. The complaint was spurred by a derogatory comment made by Mr. Richardson on September 24, 2010. However, it included inappropriate conduct and comments dating back to early 2008.

5. AB's complaint was investigated by Ms. Anny Strojin, who at that time was one of two Human Rights Specialists employed by the City. AB was unhappy with the outcome of the investigation, feeling that it left her vulnerable to further harassment and/or reprisals from Mr. Richardson. On February 1, 2011, she filed a grievance against the City complaining of "harassment... by supervisor." She subsequently made an application under section 34 of the *Code*, complaining of discrimination and harassment on the basis of ancestry, place of origin, ethnic origin, sex (including sexual harassment), and of reprisal or the threat of reprisal. The application was based on essentially the same facts as AB's original workplace complaint, although it described other instances of harassment by Mr. Richardson, including unwanted touching. It also described alleged reprisals by Mr. Richardson in the aftermath of her workplace complaint. The application named the City of Hamilton, Mr. Richardson, Mr. Garrish, Mr. Hull and Ms. Strojin as respondents. The parties agreed to remit all the issues arising from the grievance and the section 34 application to this Arbitrator.

6. In January 2012, AB came forward with a collection of emails containing pornography, alleged to have been sent to her by Mr. Richardson over a period of several years, beginning in December 2006. Both the City and the ATU retained experts to perform forensic investigations of Mr. Richardson's computer to determine the origin of the e-mails. The findings of the ATU's expert contradicted those of the City's expert.

7. Hearings into this case began on June 21, 2012. On that date, the ATU's computer expert testified. On the second day of hearings, August 30, 2012, the City indicated that it accepted the findings of ATU's computer expert that the pornographic e-mails were sent by Mr. Richardson. The City reported that Mr. Richardson had been dismissed with a severance package, ending 24 years of service.

8. Following the August 30, 2012 hearing, counsel for the ATU indicated that she required further production from the City in order to advance her case. On October 2, 2012, counsel provided written submissions setting out the production sought, and the

reasons it should be ordered. Counsel for the City provided responding submissions on October 15, 2012. I issued an oral interim order in October 2012, with written reasons in January 2013.

9. The issues to be determined in this case are whether the Collective Agreement, the *Code* and the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the “OHSA”) have been violated. If I find that there have been infringements, the question becomes what if any is the liability of the City and the named respondents. During the course of the hearing AB settled her human rights claim for damages with Mr. Richardson and withdrew her human rights claim against Ms. Stojin. Mr. Hull and Mr. Garrish were the remaining named respondents.

EVIDENCE

10. The evidence in this case pertains to a) the admitted and alleged acts of Mr. Richardson with respect to AB; and b) the response(s) of the City to AB’s allegations against Mr. Richardson. AB and Mr. Doucet testified on behalf of the ATU. Ms. Stojin, Mr. Hull and Mr. Garrish testified on behalf of the City.

11. In its August 2011 response to AB’s section 34 application, the City made an objection regarding the timeliness of the application. The City took the position that events complained of that took place before April 29, 2010 (a year prior to the application) should be dismissed for delay. Its argument was based on the proposition that in order for the events to comprise a “series of incidents” within the meaning of subsection 34(1)(b) of the *Code*, they must have a “temporal connection.” The City argued that as “no dates or timelines” were provided regarding events that occurred before August 2010 (the time of the sore hands incident), no temporal connection between the incidents of August and September 2010 and earlier incidents (the hat incident, instances unwanted touching, profane and derogatory e-mails) could be established. In its reply to the Human Rights Tribunal of Ontario (the “HRT” or the “Tribunal”), the City cited no case law in support of its proposition, and I was not called

upon to make a finding on this issue. Ultimately, the City made no objection to the admission of evidence of the earlier incidents in the course of these hearings. I therefore admitted the evidence for the purposes of determining whether or not AB was subject to harassment and discrimination in her employment.

The evidence regarding Mr. Richardson

12. The evidence against Mr. Richardson was largely provided by AB through oral and documentary evidence (including her HRT0 application). As Mr. Richardson did not attend the hearings, AB's evidence as to his conduct was uncontested.

13. AB testified that when she started in the inspector position she was concerned about proving – to her superiors and her male colleagues – that she could do the job. She described the male inspectors as a “very tight group,” with their own “culture.” AB explained that she neither condoned nor challenged the culture in the group.

14. AB testified that early in her tenure, a supervisor called her while she was on radio control and asked her how things were going. AB told him that things were going well. The supervisor then asked AB what she was wearing, to which she replied, “my uniform.” The supervisor then asked her what she was wearing under her uniform. AB hung up on the supervisor, and he never again made an inappropriate comment to her.

15. AB testified that she began receiving “pornographic” e-mails from Mr. Richardson beginning in December 2006. She described, upon receiving the first of these, being “shocked by its content.” However, at the time she believed the e-mail had been sent to her by mistake, so she did not raise the issue with Mr. Richardson. In February and March 2007, AB received four more pornographic e-mails. After the last of these, AB told Mr. Richardson that she did not appreciate them. The e-mails ceased for a period of approximately four months, but then resumed in July 2007. Through September and October 2007, AB received what she described as a “barrage” of obscene e-mails. AB finally asked Mr. Richardson to stop sending them. This time, the e-mails ceased for

approximately nine months. Finally, AB told Mr. Richardson that she would file a formal complaint against him if the e-mails continued. AB testified that Mr. Richardson merely chuckled. She told him that she was serious.

16. AB testified that in early 2008, Mr. Richardson began to touch her while she was at work. The first instance AB could recall occurred when she was assigned to radio control. While she was seated, Mr. Richardson stepped up behind her and began to massage her shoulders. Another inspector, Mr. Larry Coughlan, was present. AB pulled away and asked Mr. Richardson not to touch her.

17. In April 2008, AB received two e-mails from Mr. Richardson containing profanity. The first was an e-mail sent on April 16th in response to a request for a shift change. The exchange reads as follows:

AB: "Billy, could I do that super shift at 4am on Sat morning instead of Fri"
Mr. Richardson: "Fuck off !!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!"

The second was an e-mail sent on April 21st in response to a shift assignment request. The exchange reads as follows:

AB: "I don't need to work Gord's shift on Thursday if you can keep me on Ted's shift. The truck went in this morning for the U joints. I didn't think it was gonna last two more days."
Mr. Richardson: "Too fuckin (sic) bad you'll work where I put you."

18. AB testified that at some point during her tenure as inspector – she recalls it being in 2008 – transit employees were given new uniform items. One of the items was a hat. One day, AB was on radio control. Mr. Richardson was present, as well as two other employees, Mr. Paul Tamberelli and Mr. Coughlan. Mr. Richardson asked AB the whereabouts of her hat. When AB replied that it was at home, Mr. Richardson suggested that AB and her fiancée must have found a use for it in the bedroom. He then proceeded to imitate AB, as though engaged in sex, saying "Oh Bob, yeah, yeah, wait my hat is falling off, ok, give it to me." AB felt embarrassed and asked Mr. Richardson to stop. He continued. Once (or possibly twice) more, AB asked him to stop. Finally, in frustration, AB splashed water from a water bottle on Mr. Richardson.

According to AB, Mr. Tamberelli walked past Mr. Richardson and said, "You deserved that."

19. According to AB, Mr. Richardson twice attempted to massage her shoulders in 2009. The first attempt took place in the inspectors' lunchroom, in the presence of another inspector, Mr. Chris Thersidis. As on the earlier occasion, AB told Mr. Richardson not to touch her and to leave her alone. In her efforts to pull away from Mr. Richardson, AB knocked over some items that were on the table. She gathered up the items quickly, and left the room.

20. On another occasion, possibly in mid-May 2009, AB was nearing the end of a night shift on radio control. Mr. Richardson and Mr. Coughlan were present in the control room. AB testified that, again, Mr. Richardson made an attempt to massage her shoulders. This time, AB responded by kicking out her leg behind her. Her foot caught Mr. Richardson in the groin, and he fell to his knees. According to AB, Mr. Coughlan stated: "You deserved that. She asked you to leave her alone. Why don't you listen to her?"

21. AB testified that early in her tenure as inspector, a colleague, Mr. Gord Atkin, returned to the control room and called out "Lucy, I'm home." AB, who has red hair, perceived this as an insult (a reference to the actress, Lucille Ball) and asked Mr. Atkin not to call her that. Mr. Atkin stopped. Thereafter, however, Mr. Richardson began calling AB "Lucy." He persisted in doing so even after AB asked him to stop. The documentary evidence contains one instance of this behaviour. On June 30, 2009, Mr. Richardson sent an e-mail to AB advising her that she had used the wrong form (an older version) in her request for sick leave. As well as addressing AB as LUCY, Mr. Richardson also berated her for using the older form.

LUCY I have left your lieu request forms on my desk. I realize that we have been using the new forms for only 7 months but I figured you would realize on your own that you had to fill in the new forms. I have gone through (sic) all the trouble of creating example forms for those who might not be bright enough to figure the forms out on their own, please feel free to use these.

22. In August or September 2010, AB approached Mr. Richardson in the smoking area outside their workplace where, on the occasion, she was able to speak to him alone. [AB testified that Mr. Richardson was less likely to engage in lewd or “crass” behaviour when no one else was present.] AB told Mr. Richardson that she might have nerve damage affecting her hands, and that if upcoming tests confirmed the diagnosis, she might require time off work for surgery. According to AB, Mr. Richardson assured her that her sick benefits would cover the time off work, should she require it, and that he would accommodate her on her return to work. However, as they were returning to the workplace, Mr. Richardson, in the presence of operators and other staff, stated loudly “Yeah, sure. We all know why your hands are sore. You haven’t had a man over in a year, so you’ve had to look after yourself.” Mr. Richardson embellished his remark with a gesture simulating masturbation. The behaviour embarrassed AB, and she quickly withdrew to the women’s restroom to regain her composure.

23. The event ultimately prompting AB’s complaint took place on September 24, 2010. On that day, AB was working dispatch with fellow inspector, Mr. Harp Royal, during the afternoon rush period. During this time, Mr. Richardson called in by telephone. Mr. Royal answered the phone, but put the phone on “speaker” so that he could continue to give transit operators their assignments. Mr. Richardson gave Mr. Royal some instructions, and then said, “tell that Irish skank behind you the same thing.” The reference was clearly to AB, who is Irish. AB asked Mr. Royal to cover her tasks while she went to confront Mr. Richardson about his remark. [There was an inconsistency in AB’s evidence: In a November 8, 2010 e-mail produced in evidence, AB says she spoke to Mr. Richardson after she finished her shift.]

24. AB testified that she told Mr. Richardson that someone needed to go to H.R. about him, as his way of expressing himself was inappropriate for the workplace. When he responded with the query, “Who is going to do that?” AB replied that she would. According to AB, Mr. Richardson then said, “Well, that works both ways.” AB perceived

Mr. Richardson's remark as a threat of reprisal in the event she complained about him. Mr. Richardson apparently repeated the remark before walking away.

The evidence regarding the response of the City

25. Despite the already long history of inappropriate conduct by Mr. Richardson, AB did not take her concerns to Mr. Richardson's superiors until September 2010. It was the "Irish skank" remark that finally spurred AB to take action. To borrow AB's words, the incident was "the straw that broke the camel's back."

26. A short time after the "Irish skank" comment, AB spoke to the Transit Director, Mr. Hull, about Mr. Richardson. According to AB, Mr. Hull agreed that Mr. Richardson's remark was demeaning and disrespectful. He apparently assured AB that Mr. Richardson had been spoken to previously about his conduct. He also, according to AB, said that "in this day and age, it is no longer a boys' club, it is not 25 years ago, and that with Bill 168, we must rein people in." [Bill 168 is the Ontario statute that amended the *OHSA* so as to impose obligations on employers to develop and implement policies and procedures with respect to workplace violence and harassment.] AB testified that when she asked Mr. Hull what he would do about Mr. Richardson's conduct, Mr. Hull directed her to speak to the Transit Manager, Mr. Garrish.

27. Mr. Hull testified that although he did not remember all of the details of his conversation with AB, he remembered viewing Mr. Richardson's behaviour as unacceptable, and appreciating that AB wanted it to stop. He recalled telling AB that he had received complaints about Mr. Richardson's conduct in the past, and had spoken to him about it.

28. Mr. Hull testified that he had spoken to another supervisor and "more than one operator" about inappropriate conduct towards, and comments about, women. He acknowledged that the HSR had been subject to claims of a poisoned work environment for women, and stated the view that this was a "serious perception, if not a reality." He

also admitted that the HSR had not been promoting women into supervisory positions. With respect to AB's complaint, however, Mr. Hull testified that he felt that the task of addressing it fell to Mr. Garrish, who had direct responsibility for overseeing all union (AB) and non-union (Mr. Richardson) staff. He testified that he did not want to "undermine" Mr. Garrish's authority.

29. Mr. Hull testified that he did not contact or refer AB to a Human Rights Specialist. It was his view that the matter did not meet the criteria for a complaint as set out in the City's policy document, *"Resolving Discrimination and Harassment Issues."* Rather, he believed the matter amounted to a conflict between two employees that should be resolved by the Manager. Mr. Hull testified that he didn't fully appreciate the seriousness of the situation until AB took her complaint to the Human Rights Specialist.

30. In accordance with Mr. Hull's direction, AB took the matter to Mr. Garrish. However, as Mr. Garrish was on vacation, it was not until approximately two weeks later that she was able to meet with him. AB testified that when she met with Mr. Garrish, she asked him if Mr. Hull had spoken to him about the incident. According to AB, Mr. Garrish replied that he had not been told about it. AB then went on to describe the incident. She recalled that when she had finished, Mr. Garrish told her that he had already spoken to Mr. Richardson previously about the manner in which he spoke to and interacted with other employees.

31. AB testified that Mr. Garrish told her that in order to make a formal complaint, she would have to get a Union representative to come and see him. According to AB, Mr. Garrish also told her that her allegations, if substantiated, would mean that he would have to put a letter in Mr. Richardson's file, and that a further letter would result in his being fired (unlike a unionized employee, who might have protections under the Collective Agreement). Mr. Garrish also, according to AB, tried to excuse Mr. Richardson's conduct on the basis that Mr. Richardson was a long-time employee, whose behaviour was born of ignorance rather than ill intent. AB testified that she felt that Mr. Garrish was trying to make her reconsider filing a complaint against

Mr. Richardson. Mr. Garrish ultimately directed AB to speak to the City's Human Rights Specialist.

32. An inspector's meeting was held on November 18, 2010, a short time after AB had related the speaker-phone incident to Mr. Garrish. Mr. Garrish and Mr. Richardson attended, along with most of the other inspectors. AB was one of the four inspectors who did not attend. The minutes of the meeting indicate that the subject of "answering telephone calls through speaker phone" was discussed. The minutes record Mr. Garrish as saying:

"Conversations handled through speaker phone could not be considered private. Operators are standing close to the control room [and] can potentially hear what's being said and interpret things differently from what they really are. Unless it's a conference call, phone conversations to be handled through phone receiver, not a speaker phone."

33. In the meantime, AB contacted ATU business agent, Mr. Chris Campbell, and discussed the incident with him. Mr. Campbell suggested that they meet with the Human Rights Specialist. Mr. Campbell contacted Ms. Strojin on November 9, 2010, and a meeting with her was arranged for November 23, 2010. AB attended the meeting, bringing with her copies of the April 16, and April 21, 2008 e-mails containing profanity, and a copy of the June 30, 2009 e-mail in which Mr. Richardson addressed her as "LUCY" and disparaged her intelligence. AB testified that she told Ms. Strojin she had other offensive e-mails, but Ms. Strojin assured her that the three e-mails she had already provided were sufficient to have Mr. Richardson's employment terminated. AB also gave Ms. Strojin the name of another female employee who had been training as an inspector, but had returned to her previous position citing a "poisoned work environment" among inspectors.

34. Ms. Strojin did not have an independent recollection of the November 23rd meeting. She used her contemporaneous notes from AB's file to refresh her memory. The notes indicate that AB discussed the following incidents/matters with Ms. Strojin:

- the “Irish skank” remark of September 2010 (with Harp Royal witnessing);
- Mr. Richardson’s comment when AB told him of her intention to file a complaint (“that works both ways”);
- Mr. Richardson’s comment regarding the use of AB’s uniform hat in the bedroom (with Paul Tamberelli witnessing);
- Mr. Richardson’s comment and gesture regarding the reason AB was experiencing sore hands;
- inappropriate conversations, including sexual connotations;
- Mr. Richardson’s propensity to “play to an audience”;
- AB’s desire to have the respect of her co-workers, and her co-workers’ unwillingness to confront Mr. Richardson in her defence;
- AB’s concerns about being the only woman inspector, and how Mr. Richardson’s conduct towards her would affect her work environment;
- that a woman operator who had been in training to become an inspector had decided to leave because of the poisoned work environment amongst the inspectors

35. Ms. Strojin’s notes also record that Mr. Hull had been made aware of Mr. Richardson’s conduct, and that Mr. Hull had reportedly spoken to Mr. Richardson about it.

36. AB testified that she told Ms. Strojin that it was not her intention to have anyone fired, but that she wanted Mr. Richardson to be moved or disciplined so that he would stop harassing her. She told Ms. Strojin (and Ms. Strojin’s notes record) that Mr. Richardson brags that he hasn’t taken the course (*“It Starts With You,”* which outlines for City employees the City’s policies on discrimination and harassment, and the grounds of discrimination under the *Code*). AB testified that Ms. Strojin advised her that she could proceed with an informal resolution of her issues with Mr. Richardson, or

file a formal complaint against him. AB told Ms. Strojin that she wanted to consider her options.

37. On November 30, 2010, AB advised Ms. Strojin that she wanted to proceed with a formal complaint against Mr. Richardson. A meeting was scheduled for December 7, 2010. In the meantime, Ms. Strojin contacted Mr. Hull and set out AB's (thus far documented) allegations to him: the speaker-phone incident, the two e-mails containing profanity, and the e-mail addressing AB as "LUCY." Ms. Strojin apparently did not provide copies of the offending e-mails to Mr. Hull (or Mr. Garrish).

38. On December 2, 2010, Executive Director of HR & Organizational Development, Ms. Helen Hale Tomasik, authorized Ms. Strojin to direct Mr. Peter McNeil of Information Services to undertake an audit of Mr. Richardson's e-mail contacts with AB from January 2008 forward.

39. On December 7, 2010, AB provided Ms. Strojin with a written account of the speaker-phone incident. Ms. Strojin's contemporaneous notes from that date include the names of two witnesses who had heard Mr. Richardson's comment regarding AB's use of the uniform hat, Mr. Coughlan and Mr. Tamberelli. Ms. Strojin's notes indicate that AB reiterated her position that she did not want Mr. Richardson terminated, but that she did expect him to be disciplined. At that time, AB agreed to attend a meeting with Mr. Richardson on December 16, 2010.

40. Ms. Strojin met with Mr. Richardson on December 9, 2010. At the meeting, Mr. Richardson admitted to making the "Irish skank" comment, and to sending the offensive e-mails dated April 16, 2008 and April 21, 2008. He also admitted to sending the June 30, 2009 e-mail in which he addressed AB as "LUCY." According to Ms. Strojin's notes, Mr. Richardson didn't remember making a comment about the use of AB's uniform hat, but did recall "joking around" with AB and Mr. Tamberelli, and having water thrown on him by AB. Mr. Richardson denied making the offensive comment and gesture regarding the reason for AB's sore hands.

41. On December 13, 2010, as requested by Ms. Strojín, AB provided her written accounts of the latter two incidents: Mr. Richardson's remarks about the use of the inspector's hat in the bedroom, and his remark and gesture regarding the reason for her sore hands. At that time, she also advised Ms. Strojín that she would not be attending the meeting with her and Mr. Richardson scheduled for December 16th. AB explained that she had the flu, and also stated:

"I am uncomfortable being in the same room with Mr. Richardson at this time, and I am worried whether or not I will be able to work with him in the same capacity as I have before. I am also worried about the repercussions of this complaint and feel that he will make my work environment unbearable."

42. Thus, AB and Mr. Richardson never met together with Ms. Strojín. Ms. Strojín testified that she did not interview any witnesses to Mr. Richardson's conduct because Mr. Richardson had "admitted to a policy violation."

43. On December 21, 2010, Ms. Strojín met again with AB. Mr. Campbell, the ATU representative, also attended. Ms. Strojín did not have an independent recollection of the discussions that took place at the meeting. However, in her contemporaneous notes she wrote: "Bill to be disciplined; message to inspectors from management re: expectations; training full day / new year to be scheduled for inspectors; Bill and [AB] will attend." Ms. Strojín also recorded that AB had agreed to the proposed measures as a satisfactory resolution of her issues, and that Mr. Campbell was to be informed as to when the remedial steps had been taken. Ms. Strojín also wrote: "[AB] has agreed to inform HRS if there are any future incidents of harassment &/or discrimination." [Counsel for the ATU argued strenuously that the last three comments in Ms. Strojín's note were added later than the comments that precede them. I observe that they do appear to be written with a different pen, in slightly smaller script.]

44. In her testimony, AB denied being told that Mr. Richardson would be disciplined. She testified that Ms. Strojín told her only that her complaint "had merit", as Mr. Richardson had admitted to most of the allegations. She also testified that she was

told that all employees in the department would be sent for a course about discrimination and harassment. It was her recollection, however, that when she asked Ms. Strojin about further measures specific to Mr. Richardson, she was told that the matter had been referred back to Mr. Garrish.

45. A short time later, AB and the President of her Union, Mr. Budh Dhillon, met with Mr. Garrish, hoping to find out what disciplinary measures were being proposed for Mr. Richardson. According to AB, Mr. Garrish's reply to their enquiry was to the effect that he did not know, as the matter was being handled by Human Resources. He also purportedly asserted that even if he did know, he would not disclose the information to AB or to the ATU.

46. On January 12, 2011, Ms. Strojin met with Mr. Richardson to discuss his responsibility as a management employee to ensure a respectful workplace. Mr. Richardson reportedly committed to the following: discussing the city's harassment policies at the next inspectors' meeting; telling inspectors that the policies applied to all employees; and telling inspectors that any possible violations of discrimination and harassment policies would be dealt with "expeditiously" and that "progressive discipline" would be applied in the case of any found violations.

47. Mr. Hull testified that Ms. Strojin contacted him at the close of her investigation into AB's complaint. According to Mr. Hull, Ms. Strojin reported that Mr. Richardson had, in fact, spoken to AB in a demeaning and harassing manner on several occasions. She also expressed the view that his behaviour was serious and warranted discipline. Ms. Strojin apparently did not provide a written report of her investigation to Mr. Hull (or Mr. Garrish).

48. Mr. Hull testified that following his conversation with Ms. Strojin, he asked Ms. Strojin and Mr. Garrish to prepare a disciplinary letter for Mr. Richardson. Ms. Strojin denied having any involvement in prescribing the content or drafting the

letter. Mr. Garrish testified that it was he who ultimately wrote the letter. Dated January 18, 2011, the letter reads as follows:

Dear Mr. Richardson:

Recently a complaint was received by the Human Rights Specialist with respect to your conduct in the workplace. The complaint alleged that you had sent an inappropriate E-mail and made verbal comments to [AB] while in the workplace. An investigation into these allegations was undertaken by the Human Rights Specialist and is now completed.

You acknowledged being in contravention of the Corporate Human Rights Policies and expressed a sincere regret for your transgression, and committed that this type of behavior would never recur in the future. You have taken the mandatory "*It Starts With You*" training and are fully aware of how you should conduct yourself at all times within the workplace. As a Superintendent, you have a responsibility to be an advocate for creating and maintaining a respectful and supportive workplace and be above reproach while representing the City of Hamilton and the HSR in the course of your duties.

Please consider this letter as a disciplinary response to your inappropriate behavior and contravention of Corporate Human Rights Policies. This letter will remain on your personnel file for a period of two (2) years. Further breaches of the Corporate Human Rights Policies, if substantiated, will lead to disciplinary consequences, up to and including dismissal from your employment at the HSR.

Yours truly,

Don Hull
Director of Transit
HSR

cc. A. Stojin, Human Rights Specialist (for file)
Employee File

49. AB testified that in January 2011, she contacted Ms. Stojin to enquire about the outcome of the investigation. Her purpose, she said, was primarily to make sure she was "protected in the workplace." On January 26, 2011, AB and Mr. Campbell met with Ms. Stojin. Ms. Stojin's contemporaneous notes of the meeting provide some evidence as to what was communicated on that occasion. The notes indicate that Ms. Stojin "reviewed the steps that have been taken," and that the matter was considered "resolved" and "no further action was required." The notes also state that more training for managers and supervisors would be offered in the new year. Ms. Stojin also noted that AB was "concerned about reprisal." AB testified that

Ms. Strojin refused to give her any information with respect to disciplinary measures taken against Mr. Richardson. Her perception was that no (or, at least, insufficient) discipline had been assessed to Mr. Richardson, and that he had not even been compelled to take the human rights training course adverted to in the December 21st meeting. Her perception appeared to be confirmed by the instance, a few days after the meeting, of Mr. Richardson leaning over her shoulder and putting his hand on her back while she was working at a desk in the office.

50. AB described one further instance of unwanted touching that occurred after her complaint and its “resolution” in late 2010 / early 2011. In February 2011, AB was working at a desk in the transit office. Mr. Richardson apparently leaned over AB’s shoulder, and put his hand on her back. AB pulled away and went directly to Mr. Garrish’s office. She asked Mr. Garrish to speak to Mr. Richardson. Mr. Garrish spoke to Mr. Richardson, and the touching ceased.

51. The grievance before this board was filed on February 1, 2011. The grievance alleged “harassment of employee by supervisor” and called upon the City to “provide a harassment free respectable workplace, and to make sure that any of these actions by employees and supervision discontinue asap.” AB testified that at the Step One meeting, she told Mr. Garrish that Mr. Richardson continued to engage her in conversation about matters other than work. [The City did not object to the admission of this evidence.] She told Mr. Garrish that she wanted it stopped. According to AB, Mr. Garrish agreed to speak to Mr. Richardson. Mr. Garrish testified that AB also expressed concerns about the manner in which inspectors and operators, generally, spoke to each other. Mr. Garrish said that he assured AB that every member of the supervisory staff would be required to take the *It Starts With You* training course.

52. AB testified that she expressed to Mr. Garrish her disappointment at the outcome of the investigation. According to AB, Mr. Garrish told her that he could not assist her or answer any of her questions, as he had not been part of the investigation. He apparently suggested that she contact Ms. Strojin for further information. On

February 3, 2011, the City denied the grievance, stating: "Already investigated by Human Rights Specialist, ongoing training will be mandatory." The City did not give any evidence as to whether Mr. Richardson was ultimately subject to any ongoing training, or whether he took the *It Starts With You* course. AB, on the other hand, did take the harassment and discrimination prevention course.

53. Shortly after the Step One meeting, AB contacted Ms. Strojin, indicating that she wanted further information about the investigation and its aftermath. Ms. Strojin asked AB to set her concerns out in writing. Due to other pressing matters (family illness being one), AB did not get to this task until early April. On April 8, 2011, AB sent Ms. Strojin a list containing questions, requests and comments. The fourteen items on the list included the following:

Why was I not given any info on action taken, including why there was no disciplinary action against Mr. Richardson?

If Mr. Richardson made and (sic) admission of guilt, which Anny Strojin said he did, why was he not disciplined?

I would like a written report of findings, discussion with witnesses, results and remedy.

I am working in a poisoned work environment and have changed my shift to stay completely away from Mr. Richardson, which has effectively taken away my seniority. I am working nights and have enough seniority that I shouldn't have to work nights. This is disrupting my sleep, my health and my family life. Why is it that I have to change my shift to stay away from him? He has shown disregard for policy why has he not been removed. I did nothing wrong.

In the City of Hamilton PERSONAL HARASSMENT POLICY it says that it is the responsibility of the manager to "discipline employees who violate this policy." Why was Mr. Richardson not disciplined?

He has not only violated the PERSONAL HARASSMENT POLICY but also the HARASSMENT AND DISCRIMINATION POLICY including SEXUAL HARASSMENT and the City's COMPUTER AND E-MAIL POLICY and has received no discipline. Why?

In my initial meeting with Anny Strojin, when she saw the e-mails that were sent to me from Mr. Richardson she advised me that they were offensive enough for him to lose his job. I would like to know how it can go from losing his job to

having nothing happen at all. The complaint or evidence did not change, how can the range of outcomes differ so much?

54. When a response to her enquiries was not forthcoming, AB made her application to the HRTO, alleging harassment on the basis of ancestry, place of origin, ethnic origin, sex, reprisal or threat of reprisal. As set out above, the application was based on essentially the same facts as AB's original workplace complaint, although it described other instances of harassment by the supervisor (unwanted touching). The application also described alleged reprisals by Mr. Richardson in the aftermath of her workplace complaint, such as manipulation of schedules to deny her overtime, failure to have mobile computers repaired so that she could complete reporting tasks, and excessive scrutiny of her work.

55. AB also complained that her work environment had become poisoned as a result of the City's apparent failure to discipline Mr. Richardson and remove him as her supervisor. AB explained that she had changed to the night shift to stay away from Mr. Richardson, and that this change was affecting her sleep, her health, and her family life. She missed shifts due to stress, and was put on an "attendance management and support" plan. She stated that she felt uncomfortable being in the workplace during the one hour that her new shift overlapped with his. AB complained that fellow employees, possibly having knowledge of her complaint against Mr. Richardson, became reticent around her. She no longer enjoyed her job, she said.

56. Ms. Stojin testified that she understood that AB had a lot of questions and required clarification regarding the process followed in investigating and resolving her complaint. On May 3, 2011, she sent an e-mail to AB and Mr. Campbell inviting them to meet with her. By this time, however, AB had already made her application to the HRTO. Mr. Campbell responded to the e-mail on behalf of AB, stating that AB "feels at this point that another meeting would not accomplish anything." Mr. Campbell requested that Human Resources respond to AB's questions directly, via e-mail. Ms. Stojin responded to Mr. Campbell's e-mail by again inviting him and AB to meet with her to discuss AB's concerns. They did not meet with her.

57. In August 2011, AB was on the attendance management and support program at the HSR. By this time she had resumed smoking and drinking, and was receiving counselling. The attendance management program required AB to attend meetings with her supervisor, Mr. Richardson. AB was apprehensive about attending such a meeting, and asked Mr. Garrish if he could convene the meeting in place of Mr. Richardson. According to AB, Mr. Garrish reluctantly acceded to her request. He purportedly told AB, "Just so you know, I am attending this meeting as a courtesy to you. It will not happen again. Bill is your supervisor."

58. On August 26, 2011, the City filed a response to the HRTO application, arguing that the application should be dismissed for delay (most of the alleged incidents occurring more than one year before it was filed), that the application be deferred in light of the grievance proceedings, and/or that the application should be dismissed, the matter having been resolved in accordance with the City's policies regarding harassment and discrimination, and the resolution having been agreed to by the Applicant and her representative. The parties subsequently agreed to subsume the HRTO application into the grievance procedure.

59. On January 19, 2012, the parties met in an attempt to mediate a settlement of the grievance. For the first time, AB came forward with eight or nine e-mails containing pornography. Eventually, AB produced a total of 38 pornographic e-mails. As set out above, these e-mails were alleged to have been sent by Mr. Richardson from his personal computer to AB's personal computer, beginning in December 2006 and continuing, at irregular intervals, until as late as October 2009. Mr. Garrish subsequently asked AB to forward copies of the e-mails to him. Mr. Garrish, accompanied by City Labour Relations Officer, Mr. Ryan Fletcher, then confronted Mr. Richardson with the e-mails. Mr. Richardson denied sending the e-mails to AB.

60. Mr. Garrish testified that he noticed that the e-mails forwarded by AB contained semi-colons (";") in the "To" field of the e-mails, with no recipients specified. There was

also a concern about possible blind cc's ["BCC's"] on the e-mails. Mr. Garrish spoke to the City's Information Technology Manager, Mr. Peter McNeil. Mr. McNeil expressed the view that the missing information might indicate that the e-mails had been altered, or even fabricated. However, stating that this was not his area of expertise, he recommended that the City retain the services of an expert in computer forensics. The person he recommended was Mr. Ali Shahidi.

61. Mr. Garrish testified that he had to obtain budgetary approval from Mr. Hull before retaining Mr. Shahidi. When he went to Mr. Hull with the request, Mr. Hull suggested that the two of them again ask Mr. Richardson if he was responsible for the pornographic e-mails. When they queried Mr. Richardson about the e-mails, he again denied sending them.

62. At some point after the disclosure of the pornographic e-mails, ATU Vice President, Eric Tuck, approached Mr. Hull to ask him to remove Mr. Richardson from the workplace or, at least, remove him as AB's supervisor. Mr. Hull testified that at the time, Mr. Richardson was still professing his innocence and that he didn't want to "victimize" him further. Mr. Hull testified that based on what he had seen (possibly the original eight or nine e-mails produced by AB), the content of the e-mails did not constitute "pornography." Consequently, Mr. Richardson remained in the workplace.

63. Mr. Hull subsequently approved the budgetary allocation, and the City proceeded to retain Mr. Shahidi to perform a forensic audit of Mr. Richardson's computer for evidence relating to the e-mails. Mr. Shahidi completed his investigation in May 2012, and reported his findings to the City. His conclusion was that the e-mails were fabricated or, at least, did not originate from Mr. Richardson's computer in the form in which they were presented by AB. The Executive Summary from Mr. Shahidi's report includes the following statement: "It was our understanding that you had reasons to believe Mr. Richardson did not send those e-mails."

64. On May 17, 2012, the City forwarded a copy of Mr. Shahidi's report to the ATU. The ATU then retained its own computer forensics expert, Mr. Russ Doucet, to examine the e-mails and evaluate Mr. Shahidi's report. Mr. Doucet presented his findings at the first day of hearings on June 21, 2012. It was his view that the impugned e-mails had, in fact, originated in unaltered form from Mr. Richardson's computer.

65. Mr. Garrish testified that upon receiving a copy of Mr. Doucet's report following the hearing, he and Mr. Hull went to see the IT Manager, Mr. McNeil. They showed him both Mr. Shahidi's and Mr. Doucet's reports. According to Mr. Garrish, Mr. McNeil reviewed both the reports, and pronounced Mr. Doucet's report the more credible one. Mr. Garrish testified that he and Mr. Hull again confronted Mr. Richardson about the e-mails. The two managers apparently told Mr. Richardson that they now regarded Mr. Doucet's report as definitive.

66. Mr. Garrish testified that he could "no longer trust Richardson" and initiated the process that resulted in Mr. Richardson's dismissal. After a series of meetings between Mr. Garrish and Ms. Lora Fontana, Director of Employee and Labour Relations for the City, the terms of Mr. Richardson's dismissal were finalized.

67. On the second day of hearings on August 30, 2012, the City reported that Mr. Richardson had been dismissed with a severance package. It was subsequently disclosed that one of the terms of Mr. Richardson's severance package was that he would receive eighteen months' salary (approximately \$200,000). Mr. Garrish testified that it was ultimately his decision to terminate Mr. Richardson, on the basis that Mr. Richardson lied to him about sending the pornographic e-mails to AB.

68. AB testified that even with Mr. Richardson gone, her work environment is still poisoned. Her colleague, Mr. Royal, told counsel for the City that he had incriminating e-mails about AB. I adjourned the hearing for part of one day in October 2012 to allow the City to produce Mr. Royal's evidence. The City was unable to do so. However, the allegation that such e-mails existed left AB feeling further isolated in her workplace.

She stated that she had planned to move higher in the organization, but she was afraid to give up the support the ATU provided her.

69. I wish to note here that the ATU's efforts to obtain disclosure from the City of documents relevant to matters at issue in this proceeding were met with some resistance. For example, the ATU's request for information regarding other recipients of the pornographic e-mails (the BCCs on the e-mails) was repeatedly denied. Ultimately, the ATU requested that I make an interim ruling on production. In that ruling, I ordered further production to the extent I thought necessary to allow the ATU to make its case of harassment and discrimination against Mr. Richardson and the City. The ATU submitted that the City's reluctance to disclose what it deemed to be relevant documents amounted to a "conspiracy" on the part of the City. I cannot conclude that this was the case. However, although I found no evidence of a conscious effort on the part of the City to stymie the ATU in its efforts to construct and present its case, I do find that the City's actions with respect to production represent a continuation of the "process issues" that AB faced through the course of her workplace complaint and its aftermath.

ARGUMENTS OF THE PARTIES

Argument of the ATU

70. By way of her grievance and her HRTO application, AB complains of the following:

- harassment by supervisor;
- violation of Articles 1.01 and 6.05 of the Collective Agreement, and all other applicable articles and legislation and codes;
- discrimination in employment on the basis of ancestry, place of origin, ethnic origin, sex (including sexual harassment), and reprisal or threat of reprisal;

- harassment in the workplace because of sex.

71. The ATU's argument in support of these claims is divided into five parts:

- i) the duty of an employer to protect employees from harassment and discrimination;
- ii) the additional duty of an employer to investigate harassment;
- iii) Mr. Richardson's conduct constitutes sexual harassment under the *Code* and the *OHTA*.
- iv) an employer is directly liable for a supervisor's actions; and
- v) an employer's failure to respond effectively to a discrimination and/or harassment complaint is both a stand-alone violation and an aggravating factor in assessing damages.

72. The ATU submits that the City's duty to protect its employees from harassment and discrimination derives from the Collective Agreement, the *Code* and the *OHTA*. The relevant provisions are set out under "Analysis", below.

73. With respect to the second part of its argument – the duty of an employer to investigate a harassment complaint – the ATU cites the Tribunal's decision in *Ford v. Nipissing University*, 2010 HRTO 204 (CanLII). In that case, the Tribunal was considering the discrimination and harassment complaint of an Assistant Professor at the University who was subject to an anonymously-sent offensive and threatening e-mail. The Tribunal found that while the University met its duty to provide a safe work environment and responded promptly to the incident, it "failed to remain diligent in pursuing the matter" and "failed to sustain communications with the [complainant]." In evaluating the University's response to the incident, the Tribunal applied, in somewhat modified form, a test set out in its earlier decision in *Laskowska v. Marineland Inc.*, 2005 HRTO 30 (CanLII). The full text of that test is set out in my analysis, below.

74. In the third part of its argument, the ATU sets out eight propositions, supported by case law, in support of its position that Mr. Richardson's conduct constitutes sexual harassment under the *Code* and the *OHSA*. In brief, they are as follows:

- a. "Sexual harassment" is broadly defined as "unwelcome conduct of a sexual nature that detrimentally affects the work environment": *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 at para. 56;
- b. Gender need only be one factor leading to harassment. The ATU cites *Janzen v. Platy, supra* for the proposition that not all female employees must be subject to a particular conduct in order for the conduct to be discriminatory. As the Court states (at para. 62): "It is sufficient that the ascribing of a group characteristic to an individual is one factor in the treatment of that individual." The ATU also cites the HRTO's decision in *Smith v. Menzies Chrysler Inc.*, 2009 HRTO 1936 (at para. 150) for the proposition that "the focus of a sexual harassment inquiry is not strictly on the gender or sexual orientation of the parties." The passage continues:

[The sexual harassment inquiry] is a multi-faceted assessment that looks at the balance of power between the parties, the nature, severity and frequency of the impugned conduct, and the impact of the conduct. The key indicia (and harm) of sexual harassment is the use of sex and sexuality to leverage power to control, intimidate or embarrass the victim.;
- c. Jokes and innuendoes can constitute sexual harassment, even though they may not involve an abuse of power: *Re Canada Pacific Ltd. and BMW (Parker)* (1996), 57 L.A.C. (4th) 89 at para. 11;
- d. Name-calling can constitute sexual harassment: *Colvin v. Gillies*, 2004 HRTO 3 at paras. 221-223, 243;

- e. The harasser need not have sexual intent: *Re Hamilton Steel GP Inc. and U.S.W., Local 1005 (Eindhoven)* (2011), 2006 L.A.C. (4th) 59;
- f. A poisoned workplace constitutes harassment under section 5 of the *Code*. In support of this proposition, the ATU cites the HRTO's decision in *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10 and, more specifically, an earlier decision quoted therein (at para. 275): *Ghosh v. Domglas Inc. et al.* (1992), 17 C.H.R.R. D/216. The quoted passage provides as follows:

The importance of the “poisoned atmosphere” or “poisoned work environment” principle under the present *Code* is that there may be known instances of harassment by anonymous employees, or of known harassing conduct not caught by [s. 5(2)] because no one perpetrator indulged in a “course” of such conduct, or the member of the minority group discriminated against by having to work in that environment may not have been the person harassed.”
- g. E-mails with sexual innuendo create a poisoned work environment. In support of this proposition, the ATU cites *Re Ontario (Ministry of Natural Resources) and O.P.S.E.U. (Wickett)* (2005), 143 L.A.C. (4th) 14, in which the distribution of sexually offensive e-mails by Ministry employees was found to create “an unwelcome, oppressive and hostile environment for women and others,” resulting in a poisoned work environment.
- h. The workplace is particularly poisoned where the supervisor is responsible for the offensive conduct and comments. The ATU cites the following passage from *Chavulo v. Toronto Police Services Board*, 2010 HRTO 2037 (at para. 176):

Moreover, because the personal respondent was one of the applicant's direct supervisors, enduring his conduct and

comments became a condition of her employment [...] and poisoned her work environment. This poisoned work environment amounts to a breach of her right to be free from discrimination in the workplace as set out in ss. 5(1) of the *Code*.

75. In the fourth part of its argument, the ATU submits that the City is directly liable for Mr. Richardson's actions. The argument is based on principles set out by the Supreme Court in *Janzen v. Platy, supra* and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84. The principle that an employer is liable for the discriminatory acts of its employees committed "in the course of employment" flows out of a purposive interpretation of human rights legislation, i.e., that its aim is to identify and eliminate discrimination, not to determine fault or punish conduct [*Robichaud, supra* at para. 13]. On this basis, where discrimination takes place in a workplace, only the employer can remedy its undesirable effects and provide "the most important remedy – a healthy work environment" [*Robichaud, supra* at para. 15]. The ATU submits that the discriminatory conduct Mr. Richardson engaged in at the workplace is "work-related." It also submits that the e-mails Mr. Richardson sent from his personal computer to AB's personal computer "were rendered work-related as soon as they were brought to the Employer's attention and the Employer failed to address them."

76. The fifth part of the ATU's argument is that the City's failure to respond effectively to AB's complaint is both a "stand-alone violation" [of the *Code* and the *OHSA*] and an aggravating factor in assessing damages. The ATU submits that the City's response to the complaint – including its refusal to apologize for Mr. Richardson's conduct, its refusal to provide monetary compensation to her, and its failure to remove Mr. Richardson as her supervisor – constitutes discrimination under the *Code* and a failure to provide a safe workplace under the *OHSA*. It also submits that the City exacerbated the discrimination and harassment by alleging misconduct on her part (with respect to the allegation that she had sent the offensive e-mails), taking her off the seniority list so that she could not get overtime, and rewarding Mr. Richardson by giving him a generous separation package. The ATU also asserts that the City's conduct constitutes a reprisal for raising her rights under the *Code* (in violation of section 8) and raising her rights under the *OHSA* (in violation of section 50).

77. The ATU argues that the City's response to AB's complaint is also an aggravating factor that should be considered in determining the appropriate level of general damages. For this proposition, it offers the following passage from *Robichaud*, *supra* (at para. 19):

I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.

Argument of the City

78. The City argues that this case should be divided into three boxes, and dealt with on that basis. The three boxes are as follows:

1. The period from the time of AB's original complaint to the end of January 2011;
2. The period between the filing of AB's grievance (February 1, 2011) and the filing of her HRTO application (April 29, 2011); and,
3. The production of the pornographic e-mails by AB (January 2012) and the City's response.

79. With respect to the first box, the City argues that it responded appropriately to AB's workplace complaint. When AB first began to complain to Mr. Hull and Mr. Garrish of Mr. Richardson's inappropriate conduct, they, reasonably, asked her if she had told Mr. Richardson to stop (she had). When his inappropriate conduct continued, the two managers directed AB to speak to one of the City's Human Rights Specialists. AB set out a compendium of complaints to Ms. Stojin, who was appalled by what she heard and indicated that a response was merited. Ms. Stojin ultimately accepted AB's evidence of Mr. Richardson's conduct (provided both orally and in writing). She

interviewed Mr. Richardson, who admitted to most of the allegations (he didn't recall one, and denied another) and acknowledged that he had breached the City's harassment and discrimination policies. Because of his admissions, Ms. Strojin did not feel the need to investigate Mr. Richardson's conduct further.

80. The City argues that whatever AB understood coming out of the December 21, 2010 meeting with Ms. Strojin, Mr. Richardson was, in fact, subject to discipline. He was issued a written warning that if he engaged in such conduct again, he could face termination. The City argues that while the sufficiency of its disciplinary action could be debated, that issue is not before this Board. The issue, it submits, is whether the City reasonably met its obligation to respond to and investigate AB's complaint. The standard to which its investigation should be held is one of "reasonableness" rather than perfection. The City argues that its response to, and investigation of, AB's complaint was reasonable.

81. The City's second "box" takes in the February 2011 grievance and the April 2011 human rights complaint. With respect to the grievance, the City takes the position that it was essentially about reprisals (real or perceived): the loss of an overtime shift, and the requirement that AB hand-write her reports (due to malfunctioning mobile computers). The City submits that the first "reprisal" was dealt with through the grievance procedure, and that AB was paid for half of the lost shift. The City submits that the requirement that AB hand-write her reports was not a reprisal, as all inspectors are required to submit reports, in whatever form necessary in the circumstances. With respect to the human rights elements of the grievance, the City takes the position that these were investigated and resolved through the workplace complaint process. The City takes essentially the same position with respect to the HRTO application. It argues that all of the conduct that is complained of in the application was (or could have been) in the original workplace complaint, which was properly investigated and resolved by the City. The application, it submits, raises no issues of ongoing harassment by Mr. Richardson in the aftermath of AB's workplace complaint and its resolution.

82. The City's third "box" concerns the pornographic e-mails brought forward by AB in January 2012. The City does not dispute that the e-mails contained pornography. However, the City submits that as they were sent from Mr. Richardson's personal computer to AB's personal computer, they are not "work-related." It also takes issue with the timing of their disclosure, specifically, the fact that they were not disclosed in the course of the workplace complaint or in AB's HRTO application. Despite these objections, however, the City acknowledges that it put the e-mails at issue in this proceeding by subjecting Mr. Richardson's computer to a forensic investigation.

83. The City submits that its decision to investigate Mr. Richardson's computer was reasonable in the circumstances. The e-mails contained anomalies that would have appeared strange, even to a lay person (no BCCs, semi-colons but no recipients in the "to" line). The City thus had reasonable suspicions as to their origin. Given Mr. Richardson's denials of having sent the e-mails, the City had no option other than to have them scrutinized by a computer expert. The City vehemently denies that it directed Mr. Shahidi to his findings. The City argues that it responded appropriately when it learned that Mr. Shahidi's investigation was ultimately flawed. It accepted Mr. Doucet's findings, and fired Mr. Richardson.

84. Regarding the termination of Mr. Richardson's employment and the separation package provided to him, the City submits that its actions were appropriate. It submits that prior to discovering that Mr. Richardson lied about the e-mails, it had no reason to dismiss him. The City investigated the conduct raised in AB's complaints, and warned Mr. Richardson that if such conduct occurred again he could be terminated. There were no further instances of harassment of AB by Mr. Richardson. When it was determined that he had lied about the e-mails, the City made a reasoned assessment of the situation and concluded that it did not have "just cause" for firing him. It therefore proceeded to determine an appropriate separation package for Mr. Richardson, in view of his long-term service with the City. The City points out that the package was not a "reward" for Mr. Richardson, who effectively lost a career. It also points out that if it had precipitated a wrongful dismissal suit from Mr. Richardson, AB would likely have been

drawn into the litigation. The City argues that there should be no connection made between the severance monies paid to Mr. Richardson and its response(s) to AB's complaints.

85. The City argues that despite the ATU's attempts to conflate them, the three boxes must be kept separate. The City submits that first and third boxes were "closed" by its appropriate responses, which left no outstanding issues. The second box was closed by the City's response to the overtime matter, and the fact that neither the grievance nor the HRTO application raised any new issues that hadn't been dealt with in box one. The City argues that, on the totality of the evidence, it took its responsibilities to AB seriously, and responded appropriately to her complaints. It argues, further, that there was no evidence that the City sought to protect (or reward) Mr. Richardson, or to discredit AB.

ANALYSIS

86. As stated above, this case raises issues of possible violations of the Collective Agreement, the *Code*, and the *OHSA*. The alleged violations of the Collective Agreement and the *Code* can be dealt with together, and I will address these first.

87. The behaviours Mr. Richardson engaged in, or is alleged to have engaged in, can be categorized as follows:

- pornographic e-mails;
- unwanted touching
- e-mails containing profane language;
- sexualized comments and gestures;
- derogatory comments and e-mails; and
- reprisals, or threats of reprisals.

88. The Collective Agreement between the City of Hamilton and ATU, Local 107, provides as follows:

1.01 The general purpose of this agreement is to establish mutually satisfactory relations between the City (HSR) and its Employees in order to facilitate the provision of effective and efficient public transit services and to provide machinery for the prompt and equitable disposition of grievances and *to establish and maintain satisfactory working conditions*, hours of work, and wages for all Employees who are subject to the provisions of this agreement. [emphasis added]

6.05 The City (HSR) and the Union agree to abide by the terms of the Ontario Human Rights Code.

89. Section 48(12)(j) of the *Labour Relations Act, 1995*, S.O. 1995, Ch. 1, Sch. A, as amended (the “Act”) provides that an arbitrator has the power “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.” The statutory provisions relevant in this case are as follows:

90. The *Ontario Human Rights Code* provides:

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

5 (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

7 (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.

8 Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

46.3 (1) For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 46.2 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

91. The remedial provisions of the *Code* will be set out in the remedies part of this decision.

92. The *Occupational Health and Safety Act* provides:

25 (2) Without limiting the strict duty imposed by subsection (1), an employer shall,

...

(h) take every precaution reasonable in the circumstances for the protection of a worker.

...

27 (2) Without limiting the duty imposed by subsection (1), a supervisor shall,

...

(c) take every precaution reasonable in the circumstances for the protection of a worker.

32.0.1 (1) An employer shall,

- (a) prepare a policy with respect to workplace violence;
- (b) prepare a policy with respect to workplace harassment; and
- (c) review the policies as often as is necessary, but at least annually.

(2) The policies shall be in written form and shall be posted at a conspicuous place in the workplace.

...

32.0.6 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1(1)(b).

(2) Without limiting the generality of subsection (1), the program shall,

- (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;

- (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
- (c) include any prescribed elements.

32.0.7 An employer shall provide a worker with,

- (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and
- (b) any other prescribed information.

...

- 50 (1) No employer or person acting on behalf of an employer shall,
- (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.

- 50 (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

93. The ATU submitted that section 43 of the *OHSA* ["Refusal to work"] was also relevant to these proceedings. However, I find that none of the circumstances set out in subsection (3) of that provision was present in AB's case and, further, that there was no evidence of a "refusal to work" within the meaning of the *OHSA*.

Harassment and discrimination defined

94. Subsection 10(1) of the *Code* defines "harassment" as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be

unwelcome.” The *OHSA*, likewise, defines “workplace harassment,” as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome” [s. 1(1)]. In *Toronto Transit Commission v. ATU* (2004), L.A.C. (4th) 225, Arbitrator Shime further described harassment [at para. 249] as:

“including words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands or other unpleasantness. A single act which has a harmful effect may also constitute harassment.”

95. In *Smith v. Menzies Chrysler, supra*, the HRTO described the sexual harassment inquiry [at para. 150] as “a multi-faceted assessment that looks at the balance of power between the parties, the nature, severity and frequency of the impugned conduct, and the impact of the conduct.” “The key indicia (and harm) of sexual harassment,” it stated, “is the use of sex and sexuality to leverage power to control, intimidate or embarrass the victim.”

96. Workplace sexual harassment, the primary conduct at issue in this case, was described by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd., supra*, as follows [at para. 56]:

[...] sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas, supra*, and has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

97. The Court went on to observe that because of sexual stratification in the labour market, women tend to be at greater risk of being subject to workplace sexual harassment. I observe that this circumstance was and is particularly acute in the

context of this workplace, where AB is the sole woman inspector, and all of the supervisors (and those in more senior positions) are men.

98. The City of Hamilton's *Harassment and Discrimination Prevention Policy*, which applies to this workplace, provides the following definitions of "harassment" and "sexual harassment":

Harassment: One or a series of vexatious comments or instances of conduct that is known or ought reasonably to be known to be unwelcome/unwanted. "Vexatious" comment or conduct is comment or conduct made without reasonable cause or excuse. This conduct may be offensive, intimidating, hostile or inappropriate, based on the prohibited grounds of the Ontario Human Rights Code.

Sexual Harassment: Unwanted or unwelcome actions or comments of a sexual or gender-related nature. Sexual harassment does not have to be sexually related. Stereotypical comments or actions about one gender or the other can be a form of sexual harassment. Sexual harassment happens most often to women, but it can also happen to men or between members of the same sex. Usually sexual harassment is a pattern of behaviour that occurs frequently over a period of time. However a single incident can be serious enough to be considered sexual harassment.

99. The policy also sets out a number of examples of "harassing and discriminatory behaviours" and "sexual harassment behaviours." Examples of the former include:

- unwelcome remarks, jokes, taunts, suggestions related to [...] any prohibited grounds;
- patronizing or condescending behaviour or language which reinforces stereotypes and undermines self-respect;
- accessing, displaying, transmitting, or storing (including on the City's computer network) material which [...] is harassing, discriminatory or obscene and conducive to a poisoned work environment.

Examples of the latter include:

- unwanted touching or patting;
- sexually suggestive or obscene remarks or gestures;
- sexist jokes causing embarrassment or offence [...];
- derogatory or degrading remarks directed toward members of one sex or sexual orientation.

100. The City of Hamilton policy defines "discrimination" as:

... differential treatment of an individual or group of individuals which is based, in whole or in part, on one or more of the prohibited grounds of discrimination and which thus has an adverse impact on the individual or group of individuals.

101. In *Janzen v. Platy, supra*, the Supreme Court [at para. 48] suggested that discrimination in employment on the basis of sex may be defined as:

practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.

102. In light of the discrete provision in the *Code* dealing with workplace sexual harassment, the HRTO generally avoids characterizing sexual harassment *itself* as discrimination on the basis of sex for the purposes of subsection 5(1). However, the distinction is not clearly drawn [see HRTO Form 1-A, page 5, and *Smith v. Menzies, supra* and *Sanford v. Koop*, 2005 HRTO 53 (CanLII)], and there may be instances in which “harassing conduct” does not meet the definition of “harassment” under the *Code*, but still constitutes discrimination for the purposes of subsection 5(1) [see the passage from *Ghosh v. Domglas Inc, supra* offered by the ATU in its argument]. Generally, the HRTO’s analysis proceeds on the basis that the poisoning of the work environment (by behaviour that may also constitute harassment on a prohibited ground) constitutes discrimination in employment for the purposes of subsection 5(1) [See *Chavulo v. Toronto Police Services Board, supra*, and *Harriott v. National Money Mart Co.*, 2010 HRTO 353 (CanLII)]. As was stated by the Tribunal in *Smith v. Menzies* [at para. 151]:

“It is well-settled law that the prohibition against discrimination in section 5(1) affords employees the right to be free from a poisoned work environment in relation to Code-protected grounds. If sexually charged comments or conduct contaminate the work environment, then such circumstances can constitute a discriminatory term or condition of employment contrary to both section 5(1) and 7(2) of the Code.”

103. By virtue of subsection 46.3(1) of the *Code* (and as explained by the Supreme Court in *Robichaud, supra*) the employer is ultimately liable for discrimination in employment arising from the acts of its employees. Furthermore, an employer can also be held *directly* liable under the *Code* for failing to respond adequately to employee complaints of harassment, or for facilitating or failing to remedy a poisoned work

environment [See *Smith v. Menzies Chrysler Inc.*, *supra*]. Employers are also obliged to fulfill their responsibilities with respect to any harassment and discrimination policies mandated by a collective agreement.

104. As will be clear from what follows, I have elected not to consider the case from the perspective of the City's "three boxes" framework. It is my view that the framework does not reflect the continuity of events and the ongoing responsibilities of the parties and would, therefore, unduly constrain my analysis of the case. Consequently, my analysis will be more "free-flowing," although obviously adverting to the timing of events, responsibilities, and liabilities throughout.

Was AB subject to harassment?

105. Mr. Richardson did not give evidence during these proceedings regarding the allegations set out in the course of AB's workplace complaint and in her application to the HRTO. The only "evidence" of his response to the allegations available to me consists in the admissions and denials he made to Ms. Strojin during their December 9, 2010 meeting. At the meeting, Mr. Richardson admitted to making the "Irish skank" comment (heard over the speaker phone by AB and Mr. Royal), to sending the two profanity-laced e-mails in April 2008, and to sending the June 30, 2009 e-mail in which he addressed AB as "LUCY" and denigrated her intelligence (copies of which were produced in evidence). He apparently told Ms. Strojin that he did not recall making sexualized comments about the use by AB of her uniform hat (although he apparently did recall "joking around" with AB and Mr. Tamberelli on the subject). Mr. Richardson reportedly denied making the sexualized remark and gesture regarding the reason for AB's sore hands.

106. On the matters of the sexualized comments and gestures referred to above, and the instances of unwanted touching (shoulder massaging, etc.), the only evidence presented was that of AB. Given this circumstance, I am obliged to make some assessment of AB's credibility as a witness before accepting her evidence on these

matters. The commonly applied test for assessing credibility is that set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at para. 11:

The test [of credibility] must reasonably subject [the witness's] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

107. “That place and those conditions” can be summarized as follows. The employer is a transit service whose front-line staff of operators, inspectors and supervisors was and is largely male. It will be recalled that throughout the period during which these events (or alleged events) took place, AB was the only woman among a crew of fourteen inspectors. The seven supervisors overseeing the work of the inspectors were all male. The employer’s evidence indicates that Mr. Richardson had some history of inappropriate conduct with other employees. It appears that Mr. Richardson felt a certain “license” with respect to interpersonal relations that he might not have felt in a more gender-balanced environment. It is with this context in mind that I consider AB’s evidence of unwanted touching, and sexualized remarks and gestures.

108. In her application to the HRT, AB stated that Mr. Richardson “has a habit of touching me, sometimes slapstick actions and other times massaging my neck when I am sitting at the desk, even though I have asked him not to.” In her testimony, AB identified several distinct instances of unwanted touching, specifically, shoulder or neck massages, occurring in 2008 and 2009. She identified one further instance, in early 2011, of Mr. Richardson leaning over her and putting his hand on her back. She was able to recall details surrounding the events (time of day, items being knocked over), who was present during the events, and, in one case, what the other person said in her defence. In view of the precision with which she was able to recall these events, and the context in which they occurred, I accept AB’s evidence with respect to unwanted touching as being “in harmony with the preponderance of probabilities.”

109. AB set out the instances of sexualized remarks and gestures in an e-mail to Ms. Strojin in December 2010. She also described the same incidents in her application to the HRTO. In both cases, she detailed the surrounding circumstances (i.e., where the events took place; with respect to the “hat incident,” who was present) as well as the conduct itself. Her testimony before me was generally consistent with her descriptions of the events in the e-mail and her HRTO application. Thus, I accept her evidence as to these incidents also.

110. The sending of pornographic e-mails to the grievor also was not put to Mr. Richardson during these proceedings. Mr. Garrish testified that on at least three occasions – the first with City of Hamilton Labour Relations Officer, Mr. Ryan Fletcher in attendance, the second and third occasion with Mr. Hull in attendance – he queried Mr. Richardson on the subject. On all occasions, Mr. Richardson denied sending the e-mails. However, at the first day of hearings in this proceeding, the computer forensics expert, Mr. Doucet, presented evidence that the e-mails had, in fact, originated in unaltered form from Mr. Richardson’s personal computer. The City did not cross-examine Mr. Doucet on his testimony, and did not rely on the findings of its computer expert, Mr. Shahidi. In the result, I find that Mr. Richardson did send pornographic e-mails to the grievor between December 2006 and October 2009.

111. It is clear that despite the fact that his behaviour had been complained about in the past, that he had been reproached by colleagues and spoken to by management, Mr. Richardson felt relatively free to conduct himself as he pleased with inspectors. This appears to have been especially true with AB, who, being the only female among the ranks of those under Mr. Richardson’s direct authority, was particularly vulnerable. Even where his conduct towards her was not sexualized, it was clearly based on (or arose out of) the fact that she is a woman – for example, the e-mails containing profanity and denigrating her intelligence. Mr. Richardson, to paraphrase the *Smith* tribunal, clearly used sex (or gender) to leverage control to bother, embarrass, humiliate and, possibly, intimidate AB. Not surprisingly, AB wanted to maintain her position as inspector, and tolerated Mr. Richardson’s behaviour as best she could. However, she

also made it known to Mr. Richardson that his conduct – particularly with respect to the sending of pornographic e-mails, unwanted touching, and sexualized comments and gestures – was unwelcome. In many, if not most, cases, he *ought to have known* that the conduct was unwelcome. On the evidence, I therefore have no difficulty finding that Mr. Richardson’s behaviour towards AB from December 2006 until February 2011 constitutes “a course of vexatious comment or conduct that was known or ought reasonably to have been known to be unwelcome” and that it meets the definitions of harassment, workplace harassment, sexual harassment, and workplace sexual harassment set out in the *Code*, the *OHSA*, the human rights case law in Canada [particularly, *Janzen v. Platy, supra*], and the City of Hamilton *Harassment and Discrimination Prevention Policy*. Mr. Richardson clearly violated AB’s right to be free from harassment in the workplace because of sex under subsection 7(2) of the *Code*.

112. I do not find it necessary to make distinct findings with respect to AB’s claims of harassment and/or discrimination on the basis of ancestry, place of origin, and ethnic origin. The evidence of harassment or discrimination on these grounds was limited to the “Irish skank” remark (and, possibly, the “LUCY” address). Moreover, this evidence also went to my finding on harassment on the basis of sex.

Was AB subject to discrimination?

113. Where discrimination in employment is claimed on conduct that also qualifies as harassment under either subsection 5(2) or subsection 7(2) of the *Code*, the HRTO generally looks to whether or not the work environment has been “poisoned” as a result of the impugned behaviour. As was stated by the HRTO in *Ghosh v. Domglas Inc., supra* [quoted in *McKinnon v. Ontario (Ministry of Correctional Services), supra* at para. 275]:

It is now beyond question that the atmosphere in which an employee must work is a condition of his or her employment, and should that atmosphere be oppressive or “poisoned” for a minority group, that circumstance might amount to discrimination on a prohibited ground.

114. In her HRTO application, AB complained of a poisoned work environment in the aftermath of her workplace complaint. She explained that she felt increasingly uncomfortable around Mr. Richardson, and even her colleagues (in whom she observed a change in conduct towards her). She felt at risk of reprisal from Mr. Richardson and perceived certain of his conduct as reprisals. She changed shifts in an effort to avoid Mr. Richardson in the workplace. While AB clearly perceived her work environment as poisoned from early 2011 onward, and I agree that it was, it is my view that her work environment was poisoned as of July 2007, when Mr. Richardson resumed sending her pornographic e-mails following her protests in March of that year. I do not find it important that the e-mails were sent from Mr. Richardson's personal computer to AB's personal computer. Mr. Richardson was AB's co-worker and supervisor and AB was thus required to work alongside him and take direction from him. The e-mails would, unquestionably, have contaminated her work environment and created an oppressive situation.

115. After July 2007, along with the pornographic e-mails, Mr. Richardson subjected AB to the numerous other unwanted behaviours: profane and derogatory e-mails, unwanted touching, sexually offensive remarks and gestures. The behaviours left AB, at various times, uncomfortable, embarrassed, humiliated, and with a sense of powerlessness. Taken together, these behaviours poisoned AB's work environment. Given that Mr. Richardson was her supervisor, enduring his conduct effectively became a condition of AB's employment with the City. In the result, I find that Mr. Richardson caused AB's work environment to be poisoned on the basis of her sex, and thus breached her right to be free from discrimination in employment under subsection 5(1) of the *Code*.

Was AB subject to reprisals?

116. AB described what she perceived as a threatened reprisal in the context of a written description of the "speaker phone incident" contained in an e-mail dated November 8, 2010 (Although the e-mail was addressed to AB herself, my understanding

is that it was written by AB in anticipation of making a formal workplace complaint, and that it was subsequently forwarded to Ms. Strojin). In the e-mail, she reported that when she threatened to “go to H.R.” about his inappropriate conduct, Mr. Richardson replied “It works both ways.” AB interpreted the remark as a threat. Given that Mr. Richardson did not testify, the remark, as offered by AB, is purely hearsay. While subsection 48(12)(f) of the *Act* authorizes me to admit hearsay evidence, I am precluded from basing a finding of fact on such evidence alone [See *Girvin v. Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509 (Ont. Div. Ct.)]. I, therefore, do not make a finding as to a threatened reprisal.

117. As set out above, AB alleged three instances of reprisal by Mr. Richardson, all occurring in the aftermath of the her workplace complaint and the filing of this grievance:

- 1) manipulation of schedules and denial of overtime;
- 2) failure to fix mobile computers to stymie AB’s reporting tasks;
- 3) excessive scrutiny of her work in an effort to find fault with it.

118. The first of these – the manipulation of schedules and the denial of an overtime shift – was the subject of a separate grievance. The grievance was ultimately settled, with AB being paid half the value of the missed overtime shift. I accept this as an instance of reprisal for the purposes of AB’s HRTO application. With regard to the second and third instances, I did not hear sufficient evidence to determine conclusively that they were reprisals or threats of reprisals. However, AB’s perception of Mr. Richardson’s conduct clearly indicates that she felt at risk of reprisal following her workplace complaint. This evidence has gone towards my finding with respect to a poisoned work environment. I therefore find that the denial of an overtime shift, following the initiation of a grievance proceeding alleging violations of the *Code* by Mr. Richardson, constitutes a reprisal under section 8 of the *Code*.

119. On the basis of his infringement of AB’s rights under subsections 5(1), 7(2) and 8, I find that Mr. Richardson also violated section 9 of the *Code*.

Liability of the City

120. Having found that Mr. Richardson infringed AB's rights under subsections 5(1), 7(2) and 8 of the *Code*, I must now determine whether and to what extent the City and HSR managers bear responsibility for those infringements. I must also determine whether or not the City failed to meet its obligations under the Collective Agreement and the *OHSA*.

Harassment

121. I will deal first with the question of whether or not the City is liable for the harassment of AB by Mr. Richardson from December 2006 (the start of the pornographic e-mails) to February 2011 (the date of the last instance of unwanted touching).

122. By virtue of subsection 46.3(1) of the *Code*, corporations are not liable for harassment committed in the course of employment by their officers, officials, employees or agents. Assuming that the City of Hamilton is a "corporation" for the purposes of the *Code*, this provision precludes me from deeming the acts of Mr. Richardson to be those of the City for the purposes of finding it in breach of subsection 7(2) of the *Code*. However, this does not settle the question. Under the "organic theory of corporate liability" an employer can be held liable for "the conduct of its employees engaged in while acting in their capacity as part of the 'directing mind' of the employer" [See *McKinnon v. Ontario*, *supra* at para. 277]. In *McKinnon*, Adjudicator Hubbard invoked the theory to hold the Ministry of Correctional Services liable for the harassing conduct of members of the managerial staff at a correctional facility. In explaining the theory, Adjudicator Hubbard set out the following passage [from *Wei Fu v. Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797]:

Generally speaking, whenever an employee provides some function of management, he is part of the "directing mind." Once an employee is part of the

“directing mind”, and the contravention of the Code comes in performing his corporate function, the corporation is itself also personally in breach of the Code.

123. Adjudicator Hubbard explained the term “function of management,” as used in *Wei Fu*, by reference to his earlier decision in *Ghosh v. Domglas Inc., supra*:

... whether one employee is part of the directing mind of a corporation when dealing with another does not depend solely on their relative ranks within the organization. While the suggestion that “generally speaking, whenever an employee provides some function of management then he is part of the directing mind” is sound and helpful, it leaves open the question as to what it is that qualifies as a management function for that purpose. [...] Having regard to the nature and purpose of human rights legislation, I should think it sufficient in principle that the harassing employee was in a position to make decisions on behalf of the company seriously affecting the victim.

124. Based on this analysis, I find that Mr. Richardson was part of the “directing mind” of the HSR, such that his conduct with respect to AB effectively became that of the City. As in the case of one of the individual respondents in *McKinnon, supra*, Mr. Richardson was a supervisor who issued instructions to AB and exercised control over her work assignments and scheduling. In so doing he was effectively making decisions on behalf of the HSR. Consequently, the City is ultimately responsible for Mr. Richardson’s harassing conduct in the workplace, starting with unwanted touching (beginning in early 2008) and including thereafter: profane e-mails, sexualized comments and gestures, and derogatory e-mails and remarks. I find that the City breached AB’s right to be free from harassment in the workplace because of sex under subsection 7(2) of the *Code*.

Discrimination

125. As provided by subsection 46.3(1) of the *Code*, discriminatory actions of employees carried out in the course of their employment are deemed to be the actions of the corporate employer. On this basis, the corporate employer is liable (or shares liability) when the work environment of one or more of its employees becomes poisoned on a prohibited ground. The jurisprudence of the HRTO is also clear that it is the employer who ultimately bears responsibility for a poisoned work environment [See *McKinnon v. Ontario, supra* at para. 276; *Smith v. Menzies Chrysler, supra* at para. 179-

180; *Harriot v. National Money Mart*, *supra* at para 110]. As the HRTO stated (albeit somewhat more expansively) in *Smith v. Menzies Chrysler*, *supra*:

The law is clear that employers are liable for workplace harassment and a poisoned work environment on the basis that the employer controls the terms and conditions of the workplace and is therefore in the best position to address the environment.

126. On this principle, an employer is in breach of the *Code* and, therefore, liable when a work environment is poisoned in relation to a prohibited ground under subsection 5(1) of the *Code*. An employer is also liable for failing to take adequate steps to remedy a poisoned work environment:

Human rights jurisprudence has established that an employer is under a duty to take reasonable steps to address allegations of discrimination in the workplace, and that a failure to do so will itself result in liability under the *Code*.

Smith v. Menzies Chrysler, *supra* at para. 161 [See also *Ford v. Nipissing University*, *supra*; *Chavulo v. Toronto Police Services Board*, *supra*; and *Harriot v. National Money Mart*, *supra*].

127. Given my finding that Mr. Richardson caused AB's work environment to be poisoned from July 2007 onward, and given that Mr. Richardson at all relevant times was AB's supervisor and a member of the HSR's management staff, I find the City liable for the poisoned work environment (and in breach of subsection 5(1) of the *Code*) from July 2007 until September 2010, when AB brought the matter of Mr. Richardson's conduct to the attention of more senior management personnel. Thereafter, the question of whether or to what extent the City is liable for the poisoned work environment turns primarily on its response to AB's complaints regarding Mr. Richardson.

128. The City's response to AB's September 2010 allegation (and subsequent allegations regarding earlier conduct) can be divided into the following periods:

- a) the initial responses by Mr. Hull (Transit Director) and Mr. Garrish (Transit Manager);
- b) the response and investigation by Ms. Strojin (Human Rights Specialist);
- c) the actions of Mr. Hull, Mr. Garrish and Ms. Strojin in the aftermath of the investigation;
- d) the actions of the City following the disclosure of pornographic emails by AB in January 2012.

129. In *Laskowska v. Marineland of Canada, supra* [cited in *Harriott v. National Money Mart, supra*], the HRTO set out an analytical framework that is well suited to the circumstances of this case. The criteria for determining the “reasonableness” of the employer’s response are as follows:

- (1) **Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training:** Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees?;
- (2) **Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action:** Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act?; and,
- (3) **Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication:** Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy discrimination-free work environment? Did it communicate its findings and actions to the complainant?

Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training.

130. The City of Hamilton is a large, sophisticated employer with two comprehensive harassment and discrimination policies, as well as a further document prescribing procedures to be followed for the purpose of resolving harassment and discrimination

issues. The policies have been in place since April 2005. Both the *Harassment and Discrimination Prevention Policy* and the *Personal Prevention Harassment Policy* provide as follows:

Employees of the City of Hamilton are entitled to work in an environment free from all forms of harassment [and discrimination]. The City prohibits harassment [and discrimination] of or by any of its employees, in the workplace, or at any work-related and/or staff social functions, or in any work-related circumstances. The City of Hamilton will refrain from any actions contributing to harassment and systemic discrimination in its workplace.

The intention of this policy and its procedures is to prevent discrimination and [personal] harassment from taking place, and where necessary, to act upon complaints of such behaviour promptly, fairly, judiciously and with due regard to confidentiality for all parties concerned. The most effective element in preventing [personal] harassment and discrimination is education. To this end, education programs and information sessions will be provided to promote awareness of human rights and to foster an environment free from discrimination and harassment within the City of Hamilton.

131. The document *Resolving Harassment and Discrimination Issues* sets out the roles and responsibilities of the employee (complainant), the Human Rights Specialist, and the manager or supervisor. It also prescribes a two-part resolution process that includes an “informal resolution phase” and an “investigation phase.” Investigations are generally conducted by the Human Rights Specialist. At the close of an investigation, the Human Rights Specialist is required to provide a report of her findings to the Executive Director of Human Resources. The Executive Director is then required to make recommendations (based on the findings) to the Department Manager. The Department Manager is required to report back to the Human Rights Specialist, within ten working days, on the actions taken in response to the findings. According to the document, complainants and respondents are to be given a written summary of the investigation findings.

132. The City also has a discrimination and harassment prevention course called “*It Starts With You*.” *It Starts With You* is a one-day course designed to educate City employees with the goal of reducing (and hopefully eliminating) discriminatory and harassing behaviour in City workplaces.

133. I find that the City's policies meet the requirement of a "suitable anti-discrimination / harassment policy" in this part of the test. I also find that there was a proper complaint mechanism in place. The anti-harassment policy and the complaint mechanism also meet the requirements of subsections 32.0.1(1) and 32.0.6(1) & (2) of the *OHSA*. I further find that at the time of AB's initial complaint in September 2010, there was an awareness on the part of management of issues of harassment and or discrimination of female employees in the organization. However, the evidence overwhelmingly suggests that management had not comprehensively addressed these issues, and that management and employees had not received sufficient training to understand and appreciate the impact of discrimination and harassment, particularly on female employees.

134. Mr. Hull testified that when AB reported the speaker-phone incident to him, he informed her that he had heard complaints of Mr. Richardson's conduct in the past, and had spoken to him about his interpersonal conduct. He also testified that he had spoken to another supervisor and "more than one [transit] operator" about inappropriate behaviour towards, and comments about, women. He acknowledged that the HSR had been "experiencing ongoing claims of a poisoned environment" and that a poisoned work environment for women was "a serious perception, if not a reality." The existence of such conditions suggests that the City was not taking adequate steps to educate the HSR's (predominantly male) employees with respect to human rights, and harassment and discrimination issues. Little, it appears, was done about those acknowledged conditions aside from talking to the individuals involved in isolated complaints. The meager response to the acknowledged harassment and discrimination problems in the employee ranks suggests a shortfall in management's understanding and appreciation of the impact of those problems on female employees. I therefore find that despite the presence of laudable policies and procedures with respect to workplace harassment and discrimination, the HSR's efforts fail to meet the first part of the "reasonable response" test.

Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action

135. There are two questions at this part of the inquiry:

- Did the employer treat the complaint seriously? and,
- Did the employer deal with the matter promptly and sensitively?

136. These questions can be dealt with together. The evidence supports the conclusion that the answer to both questions is “no.” Admittedly, the complaint, as it was originally brought to Mr. Hull and Mr. Garrish consisted of only the one incident (the “Irish skank” remark heard over speaker phone). Both men agreed that Mr. Richardson’s conduct was a problem. However, neither Mr. Hull, nor Mr. Garrish contacted the Human Rights Specialist *immediately*, as required by the City’s harassment and discrimination resolution policy. Mr. Hull, in fact, believed the matter amounted to “a conflict between two employees” – a view that suggests AB somehow invited Mr. Richardson’s conduct. He saw it as something to be resolved by the manager. Thus, he directed AB to speak to Mr. Garrish. He testified that he didn’t fully appreciate the seriousness of the situation until AB took her complaint to the Human Rights Specialist. After speaking to Mr. Hull a few days after the incident, AB had to wait a further two weeks to speak to Mr. Garrish, only to be told by him that she would have to take her complaint to a Human Rights Specialist herself. Both men were more than willing, it seems, to leave the burden of dealing with the matter on her. Consequently, a full two months elapsed before AB’s complaint was finally in the hands of the Human Rights Specialist.

137. Neither Mr. Hull nor Mr. Garrish appeared to fully appreciate AB’s particular vulnerability in the workplace, the power imbalance Mr. Richardson’s remark represented, or the impact it might have had on her (both in terms of her dignity and the manner in which she would be regarded by colleagues). Mr. Garrish’s direction to inspectors regarding the use of the speaker phone – essentially, “don’t use it because

someone might overhear you saying something offensive” – and his apparent effort to dissuade AB from making a complaint against Mr. Richardson illustrate his lack of sensitivity regarding discrimination and harassment issues. Neither Mr. Hull nor Mr. Garrish supported AB’s complaint as might reasonably be expected, in view of the City’s discrimination and harassment policies. Their failure to do so is especially troubling given their awareness of concerns about Mr. Richardson’s conduct and, in the case of Mr. Hull, of deeper issues of male conduct towards female employees in the transit service.

138. The third question – Did the employer reasonably investigate and act? – must also be answered in the negative. This conclusion is, to some extent, based on the City’s application of its own complaint resolution policy. The City’s directive, *Resolving Harassment and Discrimination Issues* provides as follows:

The Human Rights Specialist has discretion to require a signed written complaint from the person making the complaint before an investigation may begin.

A complainant cannot be compelled to proceed with a complaint. Under some circumstances, the City of Hamilton may be obligated to proceed with an investigation in the absence of a formal written complaint if the allegation or allegations constitute a serious violation of the Harassment and Discrimination or Personal Harassment Prevention Policies. In these cases, the City of Hamilton will proceed with either informal resolution or an investigation, with the intent of stopping the alleged behaviour and/or preventing further incidents from occurring if there has been a violation of the policies.

In some circumstances, special arrangements may be advisable where possible to separate the complainant and the respondent in the workplace, pending the results of an investigation. The Human Rights Specialist may recommend and facilitate such arrangements.

139. AB first met with the Human Rights Specialist, Ms. Stojin on November 23, 2010. On that occasion, AB related the details of the speaker phone incident, the hat incident and the sore hands incident, and presented the two e-mails containing profanity and the e-mail addressing her as “LUCY.” AB told Ms. Stojin that she had other inappropriate e-mails from Mr. Richardson. According to AB, Ms. Stojin told her that the e-mails she had already provided constituted sufficient evidence to have Mr. Richardson’s employment terminated. In light of this assurance and the

seriousness of the allegations, it is hard to understand why Ms. Strojín put AB to the trouble of setting out her complaint against Mr. Richardson in writing. According to the directive, she clearly had discretion not to. Given Ms. Strojín's apparent belief that the allegations against Mr. Richardson constituted serious violations of the harassment and discrimination policies, requiring AB to set out her allegations in writing seemed unnecessary. Also in view of the seriousness of AB's allegations, it is hard to fathom why Ms. Strojín did not recommend and facilitate separating Mr. Richardson and AB in the workplace.

140. Ms. Strojín's investigation, once finally in train, also fell far short of what was reasonably required. She failed to interview witnesses to the hat and sore hands incidents, effectively leaving them unresolved. She also failed to interview the woman who had served briefly as an inspector and who might have provided evidence of a poisoned work environment for women in the inspector ranks. Her proposed audit of Mr. Richardson's e-mail was limited to just those correspondences between Mr. Richardson and AB, whereas a fuller audit might have provided evidence of broader issues with Mr. Richardson's conduct towards female employees. In short, she not only failed to deal with all of the allegations in AB's complaint, she also failed to look for systemic issues that, on a reasonable view, lay just beneath the surface of the complaint.

141. The City's actions following the investigation also appear to have been deficient. The evidence (in fact, the lack thereof) suggests that the requirements of the City's resolution procedure were not followed in the aftermath of the investigation. First, there was no evidence that Ms. Strojín made a written report to the Executive Director of HR, Ms. Hale Tomasik, or that Ms. Hale Tomasik made remedial recommendations to Mr. Hull. There was also no evidence that Mr. Hull reported back to Ms. Strojín on his remedial actions (although he apparently did seek her assistance in drafting a disciplinary letter for Mr. Richardson). There was no evidence that these measures were taken, even though they are stipulated in the complaint resolution procedure. Ultimately, it appears that neither Mr. Hull nor Mr. Garrish had a full picture of the extent

of Mr. Richardson's misconduct, nor were they given any direction by HR with respect to disciplinary measures or other remedial action (apart from, possibly, ensuring that supervisors and inspectors attended the human rights training course). The disciplinary letter to Mr. Richardson was ultimately drafted by Mr. Garrish, who was even further removed from the investigation than was Mr. Hull. The foregoing clearly demonstrates that the City mishandled AB's workplace complaint. I therefore conclude that the City failed to meet the requirements of the second part of the reasonableness test.

142. I also find that the City's response to the disclosure by AB of pornographic e-mails was seriously flawed. Admittedly, the timing of the disclosure was unfortunate, coming as it did more than a year after AB initiated her workplace complaint, and more than two years after the e-mails ceased. In the circumstances, it was reasonable for the City to be somewhat suspicious as to their origin. At the same time, one can also understand AB's reluctance to bring them forward, given the risk to her of further humiliation. However, once the e-mails had been disclosed, it is my view that the City could have (and should have) acted quickly to protect AB. Instead, it initiated a flawed forensic investigation of Mr. Richardson's computer that a) failed to identify other recipients, leaving AB even more vulnerable in the workplace, and b) accused her of altering or fabricating the e-mails. Worse still, the City left AB subject to Mr. Richardson in the workplace for another seven months – the first four awaiting the outcome of its investigation of Mr. Richardson's computer, the last two, after it had Mr. Doucet's more credible (and ultimately accepted) report. Given that the City was aware (or certainly should have been aware) of the poisoned work environment in the inspector-supervisor ranks of the HSR, the delay in dealing with Mr. Richardson was inexcusable.

Resolution of the Complaint (Including providing the complainant with a Healthy Work Environment) and Communication

143. I will deal with the last question of this part of the test first: Did the employer communicate its findings and actions to the complainant?

144. First, and most importantly, AB was not provided with a written summary of the investigation's findings as required by the City's complaint resolution protocol. As to what was communicated orally, there is some dispute between the parties. The conflicting evidence with respect to what was communicated at the December 21, 2010 meeting is set out above (including the possibility that Ms. Strojin added to her contemporaneous notes at a later date). Ultimately, however, whether AB was told that Mr. Richardson "would be disciplined" or that her complaint "had merit" is, in my view, of little consequence. The fact is that neither piece of information gave her a clear understanding of the findings of the investigation, or assured her that she would be protected from further harassment by Mr. Richardson.

145. A "follow-up meeting" between Ms. Strojin, and Mr. Campbell and AB was purportedly held on January 26, 2011. Ms. Strojin produced her contemporaneous notes of the meeting for the purposes of this hearing. The notes indicate that Ms. Strojin "reviewed the steps that have been taken," that the matter was considered "resolved" and that "no further action [was] required." The only measure specifically mentioned in the notes was that there would be more training for managers and supervisors offered in the new year. Tellingly, the note also indicated that AB was "concerned about reprisal" and that she was invited to inform Ms. Strojin "if there [were] any issues incl. reprisal."

146. AB testified that she was not apprised of any disciplinary measures that were being taken against Mr. Richardson. Her perception that, in fact, no measures had been taken is borne out by:

- a) the subsequent conduct of Mr. Richardson (the unwanted touching incident of February 2011) and AB's fear of and perception of reprisals;
- b) the fact that Mr. Richardson apparently did not take the human rights training course;
- c) the fact that she felt compelled to file a grievance;

- d) the fact that she sought further information from Mr. Garrish, then Ms. Strojin about the outcome of the investigation and measures being taken with respect to Mr. Richardson; and
- e) her April 8, 2011 e-mail to Ms. Strojin asking (essentially) why no disciplinary action had been taken against Mr. Richardson.

147. I accept AB's evidence with respect to the City's communications on the matter of disciplining Mr. Richardson. It is clear that HSR managers (and Ms. Strojin) fell short in this regard. However, there was a far more significant shortcoming in the City's resolution of the complaint. The resolution of a complaint of harassment and/or discrimination is not simply a matter of disciplining the offender. The key element in any resolution of such a complaint is whether the employer is able to provide the complainant with a harassment and discrimination free workplace thereafter. The actions of an employer to this end must, at the very least, be reasonable. That, I find, was not the case here.

148. As Ms. Strojin's notes of the January 26, 2011 meeting make clear, AB continued to be concerned about Mr. Richardson's conduct towards her following the "resolution" of her complaint. She evidently felt uncomfortable in Mr. Richardson's presence and remained wary of his attempts to engage her (conversation about subjects other than work, an instance of unwanted touching). Eventually, her discomfort around Mr. Richardson was enough to cause her to switch to a night shift, despite her seniority and the effect it would have on her health and personal life. The City was, or should have been, aware by that time of AB's vulnerability in the workplace. However, it failed to take even the most basic substantive measures to protect her – principally, removing Mr. Richardson as her supervisor.

149. On the entirety of the evidence, I find that the City did not respond reasonably and adequately to AB's workplace complaint. In fact, the evidence strongly suggests that the City did not accord AB's complaint the seriousness it deserved and, further, that it essentially left AB to fend for herself. The onus was always on her to advance her

complaint, in spite of the obligations of her superiors (as set out in the City's complaint protocol). In the aftermath of what can only be described as a half-hearted investigation of her complaint, the City did not take adequate steps to protect AB from further harassment and to remedy her poisoned work environment. It did not send a sufficiently strong message to Mr. Richardson that his behaviour would not be tolerated, nor did it undertake strenuous efforts to educate him as to his human rights obligations. It did not move Mr. Richardson to another shift or to another department, despite having sufficient grounds for doing so. It did not take such action against Mr. Richardson following the incident of unwanted touching in February 2011. The City's failure to provide AB with a healthy work environment is even more conspicuous in the aftermath of AB's disclosure of the pornographic e-mails in January 2012. The fact that the City did not, ultimately, take Mr. Richardson's conduct seriously is, perhaps ironically, illustrated by the fact of his termination – not for sending the e-mails, but for lying to Mr. Garrish about sending them.

150. From September 2010 onward, the City did not, to paraphrase the standard from the *Laskowska* test, "take care of its employee." On the contrary, in the manner of its response to her workplace complaint, her circumstances thereafter, and her disclosure of the pornographic e-mails, the City effectively added to AB's victimization. To put it another way, AB was victimized not only by Mr. Richardson, but also by the very process intended to protect her from further victimization. I therefore find the City clearly responsible for the fact that AB's work environment continued to be poisoned (on the basis of sex) beyond September 2010, and in breach of AB's right to equal treatment without discrimination under subsection 5(1) of the *Code*.

Reprisal

151. On the basis of Mr. Richardson's position with the HSR, I find the City liable for the reprisal against AB regarding the improper allocation of an overtime shift, and therefore in breach of section 8 of the *Code*.

Liability of the Respondents Hull and Garrish

152. To a large extent, as set out above, my finding that the City breached AB's right to be free from discrimination, from September 2010 forward, was based on the actions of Mr. Hull and Mr. Garrish in response to the allegations against Mr. Richardson AB began, at that time, to bring forward. The HRTO has held that management personnel who know, or ought to know, of the existence of a poisoned work environment for some employees and permit it to continue "thereby discriminate against the affected employees even if they themselves are not actively engaged in the production of that [environment]": *Ghosh v. Domglas Inc.*, *supra* [quoted in *McKinnon v. Ontario (Ministry of Correctional Services)*, *supra* at para. 275]. I found that both Mr. Hull and Mr. Garrish were aware - from the end of September 2010, in the case of the former, and mid-October 2010, in the case of the latter - of AB's poisoned work environment. I also found that neither manager took adequate steps to address that circumstance prior to the dismissal of Mr. Richardson in late August 2012. Consequently, I find both Mr. Hull and Mr. Garrish personally in breach of AB's right to be free from discrimination under subsection 5(1) of the *Code* and, thereby, in breach of subsection 9 of the *Code*.

Alleged violations of the *Occupational Health and Safety Act*

153. The ATU submitted that an employer's duty to protect employees from harassment and discrimination, as well as flowing from the *Code* (and a collective agreement) also derives from the *OHSA*. However, counsel for the ATU provided me with only one case in which provisions of the *OHSA* were referred to. That case - *Toronto Transit Commission*, *supra* - was cited not for its analysis of employer obligations with respect to harassment and discrimination under the *OHSA* but, rather, as support for the proposition that an arbitrator applying the *OHSA* is authorized to make an award of general damages for breaches of the *OHSA*. I note that in his decision, Arbitrator Shime does not discuss an employer's obligations under the *Act* regarding harassment, nor does he make findings with respect to breaches of the *Act*. Rather, he uses subsection 27(2)(c) as one of several bases on which to found his

jurisdiction to hear the grievance (which alleged harassment of a male employee by his supervisor). By reference to decisions of the Supreme Court of Canada and the Ontario Court of Appeal, and subsection 27(2)(c), Arbitrator Shime determined that he could imply into the management rights clause of the collective agreement a requirement that management exercise its authority to direct the workforce in a “non-abusive and non-harassing manner.” Having assumed jurisdiction on this basis, Arbitrator Shime found that in harassing the grievor, the supervisor “abused his authority” and thereby violated this implied term of the collective agreement. His award of damages was for the employer’s breach of the collective agreement (the supervisor’s harassment) and its failure to investigate and remedy the grievor’s workplace complaint. Given the absence of argument concerning the City’s obligations under the *OHSA*, and given my findings with respect to breaches of the *Code* and the Collective Agreement (summarized below), I decline to make any findings in respect of harassment under the *Act*.

154. The ATU also submitted that the City should be found in violation of subsection 50(1) of the *OHSA* for reprisal against AB for “raising her rights” under the *Act*. The alleged acts of reprisal are: taking AB off the seniority list so that she could not get overtime, raising unfounded allegations against her, and rewarding Mr. Richardson with a generous severance package. However, the ATU provided no evidence to establish that these actions were causally connected to AB’s workplace complaint or to her grievance. Additionally, as the matter of denied overtime was dealt with by way of a separate grievance, I cannot consider that conduct for the purposes of making a finding under section 50 of the *OHSA* in the context of this arbitration.

SUMMARY OF FINDINGS

Human Rights Tribunal of Ontario application

155. With respect to the allegations set out in the complainant’s HRTTO application, I find as follows:

1. AB's right under subsection 7(2) to be free from harassment in employment was breached by Mr. Richardson;
2. AB's right under subsection 7(2) to be free from harassment in employment was breached by the City;
3. AB's right to equal treatment in employment under subsection 5(1) was breached by Mr. Richardson, Mr. Hull, Mr. Garrish.
4. AB's right to equal treatment in employment under subsection 5(1) was breached by the City;
5. AB's right to enforce her rights under the Ontario *Human Rights Code* (via her grievance) was infringed by Mr. Richardson and the City.
8. Mr. Richardson, Mr. Hull and Mr. Garrish violated subsection 9 of the Ontario *Human Rights Code*.

Collective Agreement violations

156. On the basis of the foregoing analysis and conclusions, I also find as follows:

1. The City violated Article 1.01 of the Collective Agreement by failing to "maintain satisfactory working conditions" for AB;
2. The City violated Article 6.05 of the Collective Agreement by failing to "abide by the terms of the Ontario *Human Rights Code*";

REMEDY

157. The ATU made a number of arguments with respect to remedy, which I will summarize here. The first is that arbitrators in Ontario are authorized to award damages for harassment giving rise to breaches of sections 25(2)(h) and 27(2)(c) of the *OHSA* [citing *Toronto Transit Commission, supra*]. The second is that human rights adjudicators in Ontario should award higher levels of general damages (than they have historically) so as not to "trivialize the importance of the *Code* by creating a license fee

to discriminate” [citing the Report of the Ontario Human Rights Review 2012]. The third is that the “aggravating factors” in this case – including the duration of the harassment and the flawed investigation and response of the employer militates in favour of a high general damages award. Finally, the ATU argues that human rights adjudicators are authorized to award public interest remedies in the case of individual complaints [citing *Colvin v. Gillies*, *supra*, *Harriott v. National Money Mart*, *supra*, *McKinnon v. Ontario (Ministry of Correctional Services)*, *supra*, *Sanford v. Koop*, *supra*, and *Kotevski v. 1217993 Ontario*, *supra*].

158. The City acknowledges that it is not in a position to say whether or not AB’s feelings or dignity were injured as a result of Mr. Richardson’s conduct towards her. However, it takes the position that with respect to boxes one and two, all matters were dealt with by the City. It argues that it met its obligations following AB’s original workplace complaint, including conducting a reasonable investigation of her allegations against Mr. Richardson. There was no obligation on the part of the City to make a monetary award to AB, or to apologize for Mr. Richardson’s conduct (an apology, it submits, was inherent in the seriousness with which the City responded to the complaint). The findings of the investigation called for Mr. Richardson to be disciplined, and he was.

159. With these considerations in mind, I now turn to the specifics of determining a remedy in this case.

160. The original grievance calls upon the City to “provide a harassment-free, respectable workplace, and to make sure that any of these actions by employees and supervision discontinue a.s.a.p.” In her HRTTO application, AB seeks monetary compensation in the amount of \$25,000: \$5000 for lost wages, lost overtime shifts, and sick days for which she was not paid; and \$20,000 as general damages for the City’s failure to protect her from harassment and discrimination. AB also requests that her status in the Attendance Support and Management Plan be downgraded to reflect any absences associated with the stress she experienced in the aftermath of her workplace

complaint. [The request that Mr. Richardson be removed as her supervisor was met as of August 30, 2012 when Mr. Richardson was dismissed from his employment.] The ATU subsequently requested the following monetary remedies:

1. General damages to AB in the following amounts for the following specific violations:
 - a. Payment of \$20,000 for failing to provide a safe workplace in violation of the *OHSA*;
 - b. Payment of \$10,000 for the unwanted touching of AB by Mr. Richardson;
 - c. Payment of \$10,000 for the sending of pornographic e-mails by Mr. Richardson to AB;
 - d. Payment of \$15,000 for the public humiliation of AB by Mr. Richardson, including:
 - i. the “Irish skank” comment;
 - ii. the “sore hands” comment and gesture; and
 - iii. the “uniform hat” comment and gesture.
 - e. Payment of \$20,000 for the City’s failure to redress AB’s complaint, including its lack of apology, its failure to offer monetary compensation, and its requirement that AB continue working with Mr. Richardson;
 - f. Payment of \$20,000 for the City’s conduct in reprisal to AB for raising her rights under the *Code* and the *OHSA*, including taking her off the seniority list, raising unfounded allegations against her, and rewarding its treatment of Mr. Richardson through the provision of a generous separation package.
2. Damages for Mental Distress in the amount of \$20,000 for the impact on the grievor’s health and family life;
3. Special Damages to AB for the loss of opportunity for career advancement and loss of banked sick time;

4. Special Damages to the Union for its legal costs arising from the City's misconduct, including the cost of the expert, and legal expenses for the lost days due to production issues.

161. The ATU also seeks a number of public interest remedies, including:

- a. An order that the City publicly apologize to AB for not protecting her from harassment and discrimination in the workplace and for making unwarranted allegations against her;
- b. An order requiring the City to publicize the fact that it has been found in violation of the Collective Agreement, the *Code*, and the *OHSA*;
- c. An order that the City retain an expert of the Union's or the arbitrator's choosing to investigate the workplace with respect to discrimination and harassment, and make recommendations;
- d. An order that the investigator's recommendations be implemented (or that the arbitrator remain seized with implementation); and
- e. An order that the City retain an expert of the Union's or the arbitrator's choosing to develop and implement a training program with respect to the *Code* generally and sexual harassment specifically.

162. As the primary purpose of this arbitration has ultimately been to determine whether or not AB was subject to harassment and/or discrimination in her workplace, and whether and to what extent the City bore responsibility, I propose to determine appropriate remedies in accordance with the principles that guide the HRTO in such determinations, bearing in mind that violations of the Collective Agreement have also been found.

163. While the HRTO routinely holds individual respondents in workplace harassment and discrimination cases jointly and severally liable for damages with their employers, it

is my view that it is not appropriate to do so in this case. As concerns Mr. Richardson, he did not take part in these proceedings and is no longer employed by the HSR. The reasons for relieving Messrs. Hull and Garrish of such liability require some explanation, by way of reference to the Tribunal's jurisprudence. In the decisions that were put before me, the personal respondents were directly responsible for perpetrating the harassment (*Harriott v. National Money Mart, supra, Smith v. Menzies Chrysler, supra*) or for creating the poisoned work environment (*Chavulo v. Toronto Police Services Board, supra, Smith v. Menzies Chrysler, supra*). I find that neither circumstance was present here. Thus, although I found that both Mr. Hull and Mr. Garrish fell short in their duty to address AB's poisoned work environment (and were in breach of the *Code* as a result), their conduct (or, more correctly, *inaction*) does not warrant an order of damages against them. Their inaction is, more than anything else, symbolic of a systemic lack of awareness and sensitivity around harassment and discrimination issues in this workplace. This deficiency would be best addressed by a more concerted effort by the City to educate HSR staff (managers included) with respect to harassment and discrimination. It is my view that, in the circumstances, holding Messrs. Hull and Garrish liable for damages would be more punitive than remedial. Accordingly, all remedies will be determined as against the City.

164. The central principle that guides human rights tribunals in Canada was set out by Justice McIntyre in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 547:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

165. As a result of amendments to the *Code* – the removal of the remedial provision s. 41(1)(b) and the addition of s. 45.2(1) – the HRTDO does not now make a separate award for mental distress. However, damages for mental distress and/or emotional damage, and for violation of a complainant's inherent right to be free from discrimination can comprise part of a “global” award made under subsection 45.2(1). From the cases

submitted by counsel, it appears generally not to be the practice of the HRTO to award damages for each of the distinct acts of harassment or discrimination going towards its finding of a violation of the *Code* (although I note that in *Chavulo v. TPSB, supra*, the Tribunal made separate damages awards for the harassment suffered by the applicant and the subsequent “emotional damage” arising from a flawed investigation).

166. The current remedial provision of the *Code* provides as follows:

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

Monetary loss, including for injury to dignity, feelings and self-respect

167. The HRTO’s approach to determining monetary compensation for “injury to dignity, feelings and self-respect” was summarized in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) at para. 52 [cited in *Chavulo v. TPSB, supra* at para. 186; *Ford v. Nipissing University, supra* at para. 82; and *Kotevski v. 1217993 Ontario Inc.*, 2011 HRTO 705 (CanLII) at para. 41]:

The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII) at para. 16.

The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.

Objective seriousness of the conduct

168. There is no question that the conduct Mr. Richardson subjected AB to was both egregious and prolonged. AB was subject to harassment in the form of pornographic e-mails, unwanted touching, sexualized comments and gestures, profane e-mails, and derogatory comments and salutations. The ongoing harassment effectively caused AB's work environment to be poisoned from at least July 2007 onward. As Mr. Richardson's behaviour was unpredictable and generally unexpected, AB was frequently caught off guard by his actions. Two factors render Mr. Richardson's conduct even more reprehensible: the fact that he was AB's immediate supervisor, and the fact that she was the only woman at her level of the organization. That AB was required to endure the conduct for so long would inevitably have had an effect on her dignity, feelings and self-respect.

169. The City's conduct in the aftermath of AB's complaint was also unpardonable. Neither Mr. Hull nor Mr. Garrish rallied to AB's support, either by taking up the matter in a serious way with Mr. Richardson, or reporting AB's complaint to the Human Rights Specialist (as they were required to do). They simply left it to her to advance the matter. The workplace investigation of AB's complaint and additional allegations was seriously flawed (no witness interviews, allegations left unresolved, no written report to AB or transit managers). Communication with AB as to the outcome of the investigation and the measures taken to resolve the issues raised by her complaint was sorely lacking.

Mr. Richardson remained in his position as supervisor and, apparently, was not even compelled to take the harassment and discrimination prevention course. The fact that AB was compelled to take the course while Mr. Richardson was not could only have added to her humiliation. Ultimately, and quite reasonably, it appeared to AB that nothing had been done to remedy her situation. The very fact that she had come forward with a complaint left her feeling even more vulnerable than she did preceding it. In the circumstances, it is reasonable to conclude that the damage to AB's dignity, feelings and self-respect was only exacerbated by the City's half-hearted and insensitive response.

AB's experience

170. It is clear from her evidence that Mr. Richardson's conduct left AB feeling humiliated and powerless. It is also clear from her evidence that whenever possible, she made her objections to Mr. Richardson's conduct known to him. This could not have been easy given that Mr. Richardson was her supervisor, and that her experience as a woman was not shared in her work environment. AB's isolation and sense of powerlessness was even more acute in the aftermath of her workplace complaint and the investigation. She resumed smoking, and began seeing a therapist. Her attendance at work slipped to the point that she was put on an attendance management program. She switched to the night shift to avoid Mr. Richardson, despite the effect it would have on her family life and her self-worth (she had sufficient seniority to avoid nights). She still dreaded the one hour that her shift overlapped with Mr. Richardson's. AB's April 2011 correspondence to Ms. Stojin clearly illustrates the exasperation (and desperation) AB was feeling about the outcome of her complaint. AB hoped to advance to the position of supervisor, but was afraid to give up the support of her union. Furthermore, as I have stated above, AB was also victimized by the City in the manner that it responded to her workplace complaint, her disclosure of pornographic e-mails, and her circumstances in the workplace from September 2010 forward. I would add that she was also victimized, to some extent, by the manner in which the City dealt with her union in its pursuit of this matter.

171. On the basis of the foregoing, it is my view that the violation of AB's right to be free from discrimination in her workplace was significant, and the injury to her dignity, feelings and self-respect substantial. The mental anguish to which AB was subject, particularly in the aftermath of her workplace complaint was also substantial. Bearing in mind the ATU's distinct claims for specific violations on AB's behalf, I award AB a total of \$25,000.00. While this award does not address the full extent of the discrimination and harassment that AB suffered, it does address the extent to which the City is liable for this discrimination and harassment.

Special damages to AB

172. I also order the City to compensate AB for any sick days for which AB was not paid, between January 1, 2011 and August 30, 2012 and/or to compensate her for any banked sick days she was required to use during that period, to the extent that they can be linked to the poisoned work environment, or to Mr. Richardson's continuing supervision.

173. I also order the City to make requested adjustments to AB's Attendance Support and Management Plan as necessary to reflect absences attributable to the ongoing poisoned work environment and AB's continued supervision by Mr. Richardson after December 21, 2010.

Special damages to the ATU

174. In accordance with accepted arbitral practice, I decline the ATU's requests for its costs in this matter, and the cost of retaining Mr. Doucet.

Remedy for future compliance / public interest remedies

175. The City's evidence at the hearing was that all of its new employees are required to review the City's discrimination/harassment policy, and complete the City's "*It Starts with You*" programme as part of their orientation. While that is laudable, it is clear in the case of employees and management in this case, the principles and procedures contained in the policy did not get through to them so as to guide their actions in relation to AB. That raises in my mind the need for training.

176. I order the City to retain legal counsel or a consultant having expertise in human rights to evaluate the *It Starts With You* program, and provide human rights, and discrimination and harassment training to inspectors, supervisors and managers of the HSR. The City must retain a record of when each individual completed the training. Such training must take place no later than six months from the date of this Decision and is to cover all basic principles of human rights law, with at least one section of the training program to cover sexual harassment under the *Code* (specifically, what constitutes sexual harassment, the employer's obligation to maintain a harassment free workplace on an ongoing basis, the City's complaint mechanism, the principles of a good investigation, and possible outcomes from a harassment complaint). A copy of this Decision is to be provided to the legal counsel or consultant prior to the conduct of the training. Counsel for the City is to confirm in writing to counsel for the ATU that such training has taken place, within six months plus 10 days from the date of this Decision.

177. I order that within one month of the date of this decision the City post the following, in two conspicuous places in the HSR offices:

- *Human Rights Code* cards (available at:

- a written notice stating that as part of a grievance arbitration award it has been directed to communicate with them and to advise them of the following:

As an employee, you have the right to be free from harassment and discrimination, including a poisoned work environment. If you believe you have been or are subject to harassment or discrimination in this workplace, please refer to the document *Resolving Harassment and Discrimination Issues*, and speak to your manager.

- copies of the City's *Harassment and Discrimination Prevention Policy*, the *Personal Harassment Prevention Policy*, and the document *Resolving Harassment and Discrimination Issues*

178. Within one week of making the above postings, the City shall confirm in writing to the ATU that the postings have been made.

ORDER

179. In conclusion, the Tribunal orders that:

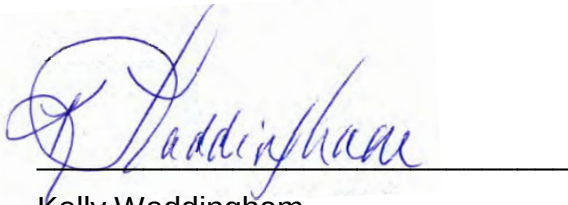
- a) Within 30 days of the date of this Decision, the City will pay to AB \$25,000.00 in general damages for violation of the *Code*.
- c) The City shall pay AB pre-judgment interest from the date of the Application to the date of this Decision in accordance with s. 128 of the *Courts of Justice Act*;
- d) the City shall pay the applicant post-judgment interest in accordance with s. 129 of the *Courts of Justice Act* from the date that is 30 days from the date of this Decision;
- e) the City is required to post the documents listed in paragraph 152 within 30 days of this decision.
- f) the City is required to conduct training of its personnel within the time frames and as set out in paragraph 155 of this Decision, and is

also required to provide confirmation of such training to the counsel for the applicant as set out in the same paragraph.

CONCLUSION

180. The grievance is upheld. I will remain seized with respect to any issues concerning the implementation of this award.

Dated at Toronto on September 18, 2013.

A handwritten signature in blue ink, appearing to read "K. Waddingham", is written over a horizontal line.

Kelly Waddingham

Arbitrator